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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ALABAMA,
DURING
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FRANCIS B. CLARK, JR.,
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The cases from page 1 to 348 were prepared by Thos. G. Jones, the official Reporter; the remainder of the volume—including index and table of cases—was prepared by F. B. Clark, Jr., Reporter under act approved February 13th, 1879.

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ERRATA.

Page 6—sixteenth line from bottom.—Insert “*is—*” after figures 458.

Page 103—eleventh line from the bottom.—Erase the semicolon after the word “taxed,” and place it after word “alone.”

Page 192—twenty-sixth line from top.—The word “and” should be “any”

CASES
IN THE
SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1877.

**Alabama Gold Life Insurance Com-
pany et al. v. Hall.**

58	1
131	562

Bill in Equity to enforce Vendor's Lien.

1. *Assignees of notes given for land; what determines priority of payment.*—Where the purchaser of lands executes several promissory notes for the purchase money, falling due at different times, and secured by mortgage, or other instrument creating a lien on the lands for their payment, an assignment of the notes is an assignment *pro tanto* of the security for their payment, in the absence of an express stipulation to the contrary; and the several assignees are entitled to priority of payment, according to the date of their respective assignments, without regard to the time when the notes severally matured.

2. *Same.*—In such case, five of the notes being payable, one, two, and three months after date, and eleven payable five years after date, with interest payable semi-annually; while the power of attorney to the vendor containing the power of sale, authorized him “to sell and convey the real estate, or so much thereof as may be necessary, upon default in payment of said notes or either of them, or the interest due thereon, as aforesaid”; and further provided that “in case he shall have negotiated any of said notes before their maturity, so that some other person may be the lawful holder thereof, then said lawful holder of said note or notes may execute all the powers herein conferred on said” [vendor] “so far as they may apply to such note or notes held by such person, and in case of the death of said vendor, his executors or administrators may execute all the powers herein conferred, so far as they may apply to any of said notes remaining assets of his estate; and the said person conducting said sale or sales shall, from the proceeds of sale, first pay the expenses of sale, then the interest and principal on the notes then due in the order of maturity, rendering the surplus, if any, to the said” purchaser: *held*, that these stipulations did not change the principle above stated so far as regards the notes last falling due.

3. *Usury; who can not set up.*—The payee of a valid promissory note, not tainted with usury, may lawfully sell and transfer it for less than the amount due by its terms; and a third person can not, in a contest with the transferee, be heard to insist that the transaction is usurious.

VOL. LVIII.

[Alabama Gold Life Insurance Co. et al. v. Hall.]

APPEAL from Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

This was a bill in equity, filed by the appellee, Henry Hall, against the appellants, to enforce a lien on lands for the purchase money. The facts of the case were thus stated by Mr. Justice MANNING:

"Nelson W. Perry, having bargained and sold large real estate, consisting of numerous parcels, in Mobile, to the Mobile and Montgomery Railroad Company, received its promissory notes for the price; the first five of which for \$5,000 each, were made payable one, two, and three months after date, (two of them two months and two others three months after date,) to him or his order. He received also eleven other notes, five for \$10,000 each, and six for \$5,000 each, in all \$80,000, all payable to him or his order, five years after date, with interest thereon semi-annually. They were dated November 1st, 1871. On the same day, he executed a conveyance of the property to the company, expressly reserving in the deed, a vendor's lien to secure payment of the purchase money, and took back from the company its letter of attorney to him; in and by which "for the purpose of enabling said Nelson W. Perry to enforce his vendor's lien aforesaid without resorting to the courts," he was constituted attorney for the company, and authorized in its name and stead, to sell and convey the said real estate, or so much thereof as necessary, in the manner prescribed, "upon default in the payment of said notes or either of them or the interest due thereon as aforesaid." And in case said "Perry [it further provides] shall have negotiated any of said notes before their maturity so that some other person shall be the lawful holder thereof, then said lawful holder of said notes or note, may execute all the powers herein conferred on the said Nelson W. Perry, so far as they may apply to such note or notes so held by such person. And in the case of the death of said Nelson W. Perry, his executors or administrators may execute all the powers herein conferred, so far as they may apply to any of said notes remaining assets of his estate. And the said person or persons conducting said *sale or sales*, shall from the proceeds of sale, pay first the expenses of the sale, then the interest and principal on the note or notes then due, in the order of maturity, rendering the surplus, if any there be, to the said Mobile and Montgomery Railroad Company. This letter of attorney and the deed were both recorded. The first five notes were paid, and are not in this case, except so far as the reference to them in the letter of attorney, may aid in the construction of that instrument."

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"Early in May, 1872, Perry transferred and indorsed six of the eleven notes, four of \$10,000 each, and two of \$5,000 each, to appellee Henry Hall for the price of \$44,000, Perry then having and retaining the other five notes. These he afterwards transferred and indorsed to other persons; and the persons and corporations to whom they respectively belonged are appellants in this suit. The eleven notes which matured in November, 1876, have not been paid, and Hall, the appellee, not having received any interest after November 1st, 1874, filed the bill in this cause, against the railroad company, and its successor, The Mobile and Montgomery Railway Company, and also against the several holders of the other notes and other persons having interests in the subject. Hall claimed a right of priority against the other note holders, and prayed a sale of the property for the payment of the amount due to him. The bill contains other allegations and prayers, in respect to matters to be considered when the cause shall be heard on the appeal which Hall has also taken—but nothing that affects the question now presented. Answers having been filed and testimony taken, the chancellor decreed that the property be sold for the payment of the debts, and, among other things, ordered further, that Hall was entitled to priority of payment over the other note holders, and should be paid accordingly."

It was shown that Hall knew the contents of the deed and power of attorney, at the time of the transfer. Perry testified that he "intended that the notes should all hold liens as provided in the mortgage or power of sale," but he further testified that the subject "was not discussed between him and Hall, nor was the matter mentioned, and he did not know what Hall's expectations were in the matter." Hall paid Perry \$44,000 for the notes, which were for \$50,000, the latter collecting the interest up to the assignment.

The decree giving Hall a priority, is now assigned for error.

BOYLES & OVERALL, LEWIS M. STONE, JNO. T. TAYLOR, for appellants.—It is conceded that in the case of an ordinary mortgage, "priority of right of satisfaction results as a legal inference from priority of assignment, and can be repelled only by showing affirmatively that no such priority was intended to be conveyed." This priority, however, is a *mere implication*, and arises when nothing is said in the writing, or in the contract of assignment, showing a different intent. There is no room for implication, when the facts of the transaction are shown. Whatever rights Perry might create by the assignment, in the absence of the contract evidenced

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by the note and power of attorney, it is certain that the contract contained in the power of attorney and mortgage, curtailed that power, and left him incapable of transferring rights or priorities, as between persons to whom he transferred, different from those fixed in the contract for the security of the notes. Whoever took one of the notes did so with notice, or were charged with notice, that every other transferred note would share equally with it. Perry might interfere with his own rights or displace them by his contracts of assignment, but he could not displace the contract rights of others, created for them by the power of attorney, in the contingency of a transfer.

Take the case of a railroad mortgage on real estate to secure the payment of one hundred bonds, made at the same time, with interest coupons attached to each bond payable semi-annually. In such case it would not be contended, we think, that a prior assignment of any one or more of said bonds would carry with it the right of prior satisfaction. 1. Because by the terms of the contract the rights of the parties were fixed and settled by it, in this, that the notes were made at the same time and payable on the same day for a purpose, that is to say, to enable the payee to make the same use of the notes as could be made with bonds, with interest coupons attached, in the market to raise money; and 2, to repel by the terms of the contract any idea of a legal inference that priority of assignment carried with it priority of right of satisfaction.

There is, we submit, no distinction in principle between the eleven notes and an equal number of railroad bonds with interest coupons attached. In both cases they are all made at the same time, and payable on the same day, and for the same purpose, to enable the holder or payee to raise money on them. The semi-annual interest on the notes is the same in principle as the coupon to the bond.

"In the absence of any special agreement with the mortgagee, it would seem to be just and equitable that each note holder should be entitled to a *pro rata* share, upon the principle that equity delights in equality."—6 Cal. Rep. 480; 29 Ill. 92; id. 297; 38 Maine, 496; 10 S. & M. Rep. 531; 23 Cal. Rep. 16; 8 Blackf. Rep. 449; 10 N. H. 246; 42 Ill. 272; 11 Md. 580; id. 211; 17 S. & R. Rep. 400; 9 Porter Rep. 547; 21 Vt. 331, 2d 550; 13 Ohio, 240.

The court will not fail to see that Perry and the railroad expected and anticipated that these notes would go into different hands, and so they then and there settled the matter of priority of lien; for they say, "any holder of *any one* of said notes may execute the power, but whoever executes this

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power *the proceeds* must be applied to the notes *in the order of their maturity.*"

All these notes now unpaid fall due on the *same day*. There were other notes falling due at different dates; these are all paid, so that there is no mistaking the object and purpose of this positive provision in the written understanding. Suppose the last assignee had filed his bill, or *had exercised the power of sale*, as the deed gives him the power, and does it make any difference whether he or Hall should make the sales? In both cases, are not the proceeds first to be applied to the notes first falling due, and then equally among those last notes all falling due on the same day?

What would have been the use of giving the last assignee the power of sale equal with the first, if he was to get nothing, and what would have been the use of contracting in the deed that those notes *falling due on same day* should share *pro rata*, if Perry or the court could set it aside at pleasure? We insist, therefore, if Perry had actually made by agreement any such priority for Hall, it would have been a violation of the written papers under which he held, and a gross fraud on the subsequent purchasers of notes, and Hall participating in it could not benefit by it. Perry was a trustee for the note holders, as fast as the notes were transferred by him. Those dealing with him had notice of the measure of his powers. Even if he had attempted to give a priority between different note holders, it would have been a breach of duty, and the first transferee could take no priority. Hall is the actor here. His contract with Perry was usurious, and he was not a *bona fide* purchaser and not entitled to a preference.

P. HAMILTON, *contra*.—When Perry assigned the notes to Hall, he thereby gave them a priority of satisfaction over the notes remaining in his hands. The lien of the remaining notes were thus subordinated to that of the notes transferred to Hall. The after assignment of these notes could not give the assignees any higher right than the assignor himself had.—4 Ala. 452; 9 Ala. 645; 15 Ala. 501; 25 Ala. 327; 1 Ala. 708; *White v. King*, 53 Ala. Perry was the owner of the whole debt, and the security given for its payment. What rule of law prevented him from giving one note priority over another whenever he chose to do so, in a contract with a third person? There is no analogy between the supposed case of the issue at different times of railroad bonds secured by the same mortgage, and the case presented by this appeal. In the first case, the *debtor* merely gives an evidence of debt, and transfers no security then held by him. This evidence

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of debt was already clothed with a lien, and the lien passes, by the terms of the mortgage, to the holder of the bond. Here the *creditor* deals with *debt* and the *security* which belong to him, and by his own act postpones his lien to that of his transferee.

This case is very like that before the court in *Cullum v. Erwin*, 46 Ala., and can not be distinguished from it in principle.

MANNING, J.—A large amount being involved in this cause, it has been argued earnestly and ably; and it has received our careful consideration. In this State it is settled that where several promissory notes are given by the purchaser of property to his vendor, for instalments of the price, and a mortgage or other instrument is executed, whereby the property is charged with the payment of the notes, without any provision that the proceeds of the security shall be first applied to the discharge of one or more of the notes in preference of others, and the payee, while owning all the notes, indorses one or more of them to another person, without reserving to himself an equal or any other interest in the security, the indorsee becomes entitled to so much of the proceeds of the property thus charged, as will, if sufficient, pay the notes so indorsed, whether there remain anything more or not, for the discharge of the notes retained. And the law is not different though the note or notes which the payee assigns be of those that mature at a later day than those which he keeps. And, of course, an assignee of the notes that were thus retained, takes them with no greater security than was left to the payee who assigns them. The argument of ORMOND, J., in the well-considered case (though not the first on the subject) of *Cullum v. Erwin*, 4 Ala. 458, that a debt secured by mortgage is the principal, and the mortgage a mere accessory or incident; that an assignment of the debt, is, in equity, an assignment of the mortgage; that if there be several notes or bonds given for the debt, the assignment of one of these is, unless otherwise provided, an assignment *pro tanto*, of the assignor's interest in the mortgage; that if the mortgage prove insufficient for the entire debt, the assignee is entitled to payment in full from the proceeds of the mortgage, before his assignor, the mortgagee, shall receive anything; and that since the latter can afterwards transfer no greater interest than he has himself, if he shall transfer successively, in the same manner, the remaining notes to other persons, each successive assignee will acquire all the rights of the assignor at the time of assignment, and no more; a result which

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would follow, whether the notes be transferred in the order in which they mature, or not. These consequences, the court held, flow from the mere assignment of the debt, unless it be otherwise stipulated. And in *The Bank of Mobile v. The Pl. & Mer. Bank*, (9 Ala. 648), the court, through the same esteemed judge, say: "Priority of right of satisfaction results as a legal inference from priority of assignment, and can be repelled only by showing affirmatively that no such priority of right was intended to be conferred."

In *Nelson & Hatch v. Dunn*, (15 Ala. 501) eleven notes had been executed, falling due in successive years, and secured by a deed of trust to a third person. The payee first assigned some of those that were made payable at a later day than others which were then retained; and afterwards he assigned some of these and others that remained. The court held that the same rule of priority, without regard to the order in which the notes matured, must be applied in this case, as in the others. And it was again affirmed and applied in *Griggsby v. Hair*, (25 Ala. 331) where the notes were secured by a bond which the vendor executed to make title, when the purchase money should be paid, the title being retained as security.

But counsel for appellants insist that according to the terms of the letter of attorney, and the understanding of the parties when the notes were indorsed to Hall, the rule of priority of payment, according to priority of assignment, should not obtain in this case. In regard to this understanding, if oral testimony alone be admissible to establish it, the evidence shows that it was only Mr. Perry's idea or opinion of the effect of what was done. He thought that the assignment of a part of the notes, operated as an assignment of the security *pro rata*, and not *pro tanto*. And he doubtless supposed that this was Mr. Hall's idea also. But no stipulation or condition of that kind is shown to have been assented to by Hall. It is a matter that was not even talked about. They both, evidently, were at that time, of the opinion that the security was ample for all the notes. Indeed, no apprehension appears to have then existed in regard to the solvency, or the sufficiency, of the company which made them. The legal inference from priority of assignment, therefore, is not repelled by the testimony.

Is it repelled by the contents of the writings? It has been argued that the transaction is like that by which a railroad company raises money to build or equip its railway, when it issues its bonds secured by a mortgage of the road and its appurtenances; in which case, it is, of course, intended that if the security be insufficient, the several holders of the

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bonds shall be paid, without preference of any, *pari passu*. But, besides that this is an original issue of bonds, not till issued, having any value, by the mortgagor, all bearing the same date, and to be regarded, by relation, as issued at the same time, and not an assignment by a mortgagee of things which are of value while in his hands, and which he may dispose of in any manner he may choose,—the provisions of the letter of attorney show expressly that the security was not created for all the notes equally. The direction that they shall be paid “in the order of their maturity,” entitled the holders of the notes payable one, two, and three months after date, to payment successively and in full, before anything should be applied to the discharge of the other eleven notes, though they and the former were all past due and unpaid, when the lien should be enforced. Such a prescribed preference destroys the likeness supposed to exist between this and the railroad transaction to which it is compared, and shows that the former was not intended to be of the same kind as the latter. This is made yet more manifest by the clause which provides, if the notes, or some of them, be *negotiated* before maturity, any person who may become the “lawful holder” thereof, shall have the right to execute the powers of sale and payment conferred on Perry—“so far as they apply to such note or notes so held by such person”—and by the further clause that in the event of Perry’s death, his executors or administrators may also execute the same powers—“so far as they may apply to any of said notes remaining assets of his estate.” In what railroad mortgage made to secure payment *pari passu*, of the bonds about to be issued, was authority ever given to the holders of some of the bonds to sell the property and pay themselves without regard to the rights of those who hold others of the same batch of bonds, bearing the same date, payable at the same time and in all respects alike? Whether it would be practicable, or not, under a letter of attorney framed as the present one is, for such powers as are conferred on Mr. Perry, to be executed, “without resorting to the courts,” by persons not named in it, and whose right to sell real estate might depend upon its being proved by merely oral testimony, that they were “lawful holders” respectively, of some of the notes, and that Mr. Perry had *negotiated* them before maturity, is a question which, though it might have arisen, we have not now to determine. But it is obvious from the provisions referred to, that it was intended, if the necessity to sell should come, that the property might be sold in parcels (“so much thereof as necessary,”) by different persons, to pay the note or notes, of which they might, respectively, be “lawful holders,”

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and that they should severally have no authority to sell more than might be sufficient to pay expenses of the "sale or sales," and the notes held by them, unless they might do so to raise money enough to discharge some of the notes of earlier maturity and still unpaid—to which priority is given by the terms of the letter of attorney.

The office of the clause requiring payment to be made of the notes "in the order of maturity," is fully performed by its securing priority to the first five falling due. In regard to the other eleven, there is no particular provision at all. What remains of the security is to go to the payment of them—but whether *pari passu*, or to one before another, is not prescribed. What then? Suppose all the eleven notes remained in Perry's hands, and he, exercising the power conferred upon him, had sold the property and had realized from it, say \$50,000; must this be credited—was it contemplated that it should be, *pro rata* on each of the notes? Might he not have cancelled as paid, so many of the notes as would make up that sum and retain the others as still entirely due? If he had done so, and had sued on these afterwards, could the debtor have pleaded that Perry had received moneys which, according to the terms of the instrument by which they were obtained, should have been credited on the notes sued on, and that he was, therefore, entitled to recover only the balance that would in that case have been due on them? Or, is there anything in the instruments to prevent him, while holder of all the notes, upon transferring one of them, from writing on its back, that he indorsed and assigned it to A B *without any interest in the security provided, by deed and letter of attorney, for it and other notes?* or, *with a pro rata interest therein?* or, *with so much of the security as may be needed to pay the notes?* These questions must evidently be answered in the negative. And it, therefore follows, that when Mr. Perry indorsed the notes he negotiated to Hall, in such a manner as the law declares shall operate as a transfer, in equity, of an amount of the security equal to the amount of the notes, he thereby gave to those notes priority of payment out of the security, over the notes retained by himself and afterwards transferred to others.

The argument that the transaction between Perry and Hall was usurious, and the latter is therefore not entitled to recover the whole amount of the notes he purchased, is without foundation. In the first place, the law does not prohibit the payee of a note, which is itself not tainted with usury, from selling it in good faith, for a less sum than the amount of it.—2 Pars. on Contr. 421. And in the second place, if it did, strangers to the transaction, as the assignees of other

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notes are, cannot be heard to make that objection—*Fenno v. Sayre*, 3 Ala. 458; *Cook v. Dyer*, *id.* 643; *Harbinson v. Harrell*, 19 Ala. 753; *Cain v. Grinnon*, 36 Ala. 168.

Let the decree of the chancellor be affirmed.

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111	665
58	10
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181	545

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Bill to enforce Equitable Mortgage.

Equitable mortgage; what constitutes; rights of parties under.—The owner of lands conveyed them to a railroad company, expressly reserving in the deed what was denominated a "vendor's lien," to secure notes given for the purchase money, taking back at the same time from the purchasers, an irrevocable power of attorney, authorizing the vendor or transferees to whom he should negotiate the notes, as attorney in fact of the company, and in its name, to sell from time to time so much of the property, as should be necessary to pay the notes at maturity, or the interest thereon, which was payable semi-annually. Afterwards, and before the maturity of the notes, creditors of the railroad company, having notice of the deed, holding bonds secured by mortgage covering after acquired property, of prior date to the conveyance of the lands, but inferior to the lien reserved, obtained a decree of foreclosure, under which they purchased all the property of the railroad, making payment in bonds thus secured, and thus came into possession of the lands. The purchasers used the lands, collected rents, and refused to pay interest, although demanded of them, remaining in possession after the maturity of the notes, without offering to pay either. At that time the lands were insufficient to pay the amount due upon the purchase money, and the original vendor and vendee were both insolvent. The transferee of some of the notes thereon filed his bill to enforce the lien, and sought a decree against the last purchasers for use and occupation during the time they were in possession. *Held* :

1. The vendor and his transferees of the notes acquired an equitable mortgage on the lands.

2. The bondholders were purchasers of the property for value, and lawfully in possession; but acquired only the equity of redemption, remaining after the reservation of the lien and the execution of the power of attorney; and in the absence of some stipulation or agreement to that effect in the contract of purchase, were not liable for the mortgage debt or interest thereon.

3. The purchasers were not liable for rents, or for use and occupation, not exceeding interest maturing during the possession, prior to a demand upon them for possession of the property, or its being taken from them by appointment of a receiver.

2. *Reports of officers to stockholders; for what, will not bind corporation.*—Neither the reports of officers of a corporation made to its stockholders, nor reports made to its directory, in which certain claims for which the corporation is not bound, are estimated as liabilities of the corporation, will bind the corporation to pay either principal or interest of the debt, or prevent it from changing its purpose with regard thereto.

APPEAL from Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

This was a cross appeal, and cross assignment of error,
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under the rules by consent of parties, on the record brought up on the appeal of the *Alabama Gold Life Insurance Company v. Hall et al.* That case is reported *ante*, p. 1, and involved the right to priority of satisfaction, between different persons to whom Perry, the vendor, transferred at different times, notes given by the Mobile and Montgomery *Railroad Company* for the purchase money of certain real property in Mobile.

The question in this case is, whether the Mobile and Montgomery *Railway Company* is bound in equity to make compensation, or pay rent, to the holders of these notes, (the land being insufficient to pay the amount due) during the period the latter company—which succeeded to the rights of the *railroad* company by purchase under a decree in chancery—remained in undisturbed possession and use of the property.

The case made by the pleadings and testimony with respect to the present appeal, is as follows:

On November 1st, 1871, N. W. Perry, who became insolvent before the filing of the bill, was the owner of the property in controversy, on which there were then certain liens, not material to be particularly noticed, in the view the court took of this case. On that day he sold and conveyed the property, by warranty deed, to the Mobile and Montgomery *Railroad Company*, reserving on the face of the deed a vendor's lien, for the payment of the purchase money, for which the *railroad* company executed its sixteen promissory notes, of even date with the deed. Each of these notes were payable in bank to the order of Perry. The first five notes were for five thousand dollars each, with interest from date, the last of which matured February 1st, 1872, and were all paid by the *railroad* company at maturity. The other notes were "five notes each for \$10,000, with interest from date, and six notes each for five thousand dollars, with interest from date, the principal of the last named eleven notes being payable five years after date, with the interest thereon being payable semi-annually." Perry, on the same day, executed and delivered to the *railroad* company, his bond for title, conditioned, among other things, to obtain a proper conveyance of the interest of one Ida Jones, a minor, and to hold the *railroad* company and its successors harmless, against all damage arising out of the title of said Ida. On the same day, and as part of the same transaction, the *railroad* company executed a power of attorney to Perry, which recited the purchase, Perry's retention of a vendor's lien, and the date, amount, number, terms, and maturity of the notes, and continued:

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"Now, in consideration of the premises and of one dollar by Nelson W. Perry paid to the Mobile and Montgomery Railroad Company for the purpose of enabling the said Nelson W. Perry to enforce his vendor's lien aforesaid without resorting to the courts, it has made, constituted and appointed the said Nelson W. Perry, and by these presents does hereby make, constitute and appoint the said Nelson W. Perry its true and lawful attorney for it, the said Mobile and Montgomery Railroad Company, and in its name, place and stead to sell the above described premises, or so much thereof as may be necessary, upon default in the payment of said notes or either of them, or the interest due thereon as aforesaid, and to make deed to the purchaser or purchasers in the name of said Mobile and Montgomery Railroad Company. * * . But in case said Nelson W. Perry shall have negotiated any of said notes before maturity, so that some other person shall be the lawful holder thereof; then said lawful holder of said note or notes may execute all the powers herein conferred on said N. W. Perry, so far as they may apply to such note or notes so held by such person, and in case of the death of said N. W. Perry, his executors, &c., may execute all the powers herein conferred. Both the deed and power of attorney were duly recorded.

Under this purchase the *railroad* company went into possession, changed some of the buildings to make them suitable for a depot, and used the property for that purpose. It paid the first five notes, and interest on the others up to the year 1874.

On the 25th of April, 1870, the *railroad* company executed its mortgage, to certain trustees to secure an issue of bonds, upon all the property it then had or might thereafter acquire. The *railroad* company became insolvent in 1873, and the trustees filed a bill for foreclosure in the Chancery Court at Montgomery. A decree was obtained, under which all the property of the *railroad* company was sold, and bid in by the trustees for the benefit of the bondholders, the amount of the bid being paid in bonds secured by the mortgage. Nearly all of the bondholders assented to this arrangement, and under the laws of Alabama regulating the formation of such corporations, these purchasers formed a corporation known as the "Mobile and Montgomery Railway Company," to which, in November, 1874, pursuant to the order of the court, was delivered possession and control of all the property of the *railroad* company, including the premises in controversy.

The *railway* company was never disturbed in its possession by the holders of the Perry notes or other persons who, as it is averred, held liens on the property older than Per-

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ry's title. It is unnecessary, however, to go into detail as to the alleged defects in Perry's title, as it would seem from the testimony that the original purchaser from Perry (the *rail-road* company) was fully informed as to the state of the title, and that matter was not deemed material in the present appeal. At the time the *railway* company took possession, property had greatly depreciated, and the real estate purchased of Perry was not worth the amount then due on the purchase money. The railway company made no payments on the principal or interest of this debt, but used the property and collected some rents, and was in such use and possession when the bill was filed. After the new company took possession, its *status* as to this property seems to have been the subject of some discussion among its officers, and for a time it was left to its president to determine what was best to be done about it. Afterwards, a committee of the directory examined the matter, and came to certain conclusions with reference to it, stated in a report, which is mentioned further on. Parties interested in the notes also had interviews with its president to induce him to pay the debt. On the 17th day of January, 1876, Hall made a formal written demand for the payment of the interest due on the notes held by him. The president of the *railway* company informed Hall's attorney that the matter would be referred to the legal adviser of the company.

In April, 1876, P. Hamilton, Esq., counsel for Hall, wrote to Tyler, president of the railway company, asking "if the company was any better prepared, than it was at former interviews, for the payment of the purchase money still unpaid upon the depot property," and asked to have certain reports furnished him, &c. To this Tyler replied, that he knew of no change in the position of the company, which he understood to be, that "as soon as the sellers of the property have cleared all previous liens, which they agreed to do, the railway company would carry out the contract, or give up the property without litigation." He also enclosed certain reports, extracts from which were given in evidence before the register. Some other letters passed between those gentlemen, in one of which Tyler made a proposition to have the property appraised and take it at its value, but nothing seems to have come of it. On the 6th of June, Mr. Hamilton proposed that the railway company pay certain taxes and the interest, and that the other matters be left for negotiation, and requesting reply, otherwise a foreclosure would be resorted to. The proposition was declined; the president of the railway company, it seems, was of opinion that the payments and amounts expended by the old company and by

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the new company, in improvements and repairs, would exceed interest or rent on the amount of the purchase money, and that the property was not worth half of the amount the *railroad* company agreed to pay for it.

Thereupon, on the 15th day of June, 1876, Hall, who was owner of six of the notes, which had been transferred to him by Perry, filed a bill against the other note-holders, and against the Mobile and Montgomery *Railway* Company, and also against the *railroad* company and others, praying, among other things, not material to be here noticed, that a receiver be appointed to take charge of the property, and to collect the rents, incomes and profits of the property to become due, and also "reasonable compensation of the railway company, for the use and occupation it has heretofore had of said property." In the first stages of the cause a motion was made for the appointment of a receiver, but action on it was postponed from time to time, and on the 14th day of July, 1877, the day on which the final decree was rendered, another motion was made for the appointment of a receiver, which also does not appear to have been acted on.

The answer of the railway company sets up certain defects in Perry's title, denies any liability for the debt of the *railroad* company, or to pay interest thereon, or to pay for use and occupation; asserting that no proper demand for possession had ever been made, and that it had done nothing to impair complainant's rights, but had simply remained inactive, as it had the legal right to do. The answers of the other defendants need not be stated, as they are immaterial to the question here presented.

A reference was ordered, to ascertain the respective amounts due the several note-holders, and certain other matters not necessary to be here noticed; and a reference, on motion of complainant, was also ordered before a special master, to whom the other matters had been referred, to ascertain and report the "value of the use and occupation of the premises to the railway company since it has had possession," and also the amount of rents collected. Among other evidence submitted to the master, on these references, were certain published reports of the officers of the *railway* company made to its stockholders and directors.

In his report to the stockholders December 18th, 1874, the president of the *railway* company, speaking of the purchase, says:

"The recent sale of the Mobile and Montgomery Railroad, and its purchase on account of the first mortgage bonds, places the entire property and franchise in the hands of the new company, which has been legally organized under the

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laws of the State of Alabama, and named '*The Mobile and Montgomery Railway Company.*'

"In accordance with the conditions of the mortgage, the trustees had the right to buy in the property for and on account of *all the bondholders*, at a price not exceeding the amount, principal and interest, due on the bonds at the time of sale, as the chancellor, in his decree, instructed them so to do; and further, these bonds having been surrendered to the Register of the Chancery Court for cancellation, the Register should issue a certificate, entitling the holder to an undivided interest equal to 1-3022 of the whole property, subject to the following indebtedness, viz": (Among other things) "Mortgage on Mobile real estate, \$12,750, due in June, and balance, \$80,000, due in November, 1876."

The decree under which the purchase was made was not offered in evidence, but it was agreed between counsel that the purchase was made by the trustees in the mortgage as hereinbefore stated. Nothing was there stated in this agreement about the liens to which the purchase was made subject. Tyler, in his testimony before the Register, speaking of the foreclosure, subject to the lien of certain bonds older than the one foreclosed, says:

In the president's report for the year 1875, under the head of a "statement of the condition of the railway company as shown by the general books of the company," there is included in the liabilities the following item: "Mortgage notes for real estate and depot property at Mobile, \$92,750." In this same report, it is also stated, that "There are some legal matters connected with the depot property at Mobile, which renders it advisable not to pay the large balance, \$92,750, due on that property, until certain mortgages, which *antedate* our titles, shall be removed, according to contract; but in the meantime, we are in possession and in use of the property, and do not anticipate any injury to our interests at present, or in the future. The board of directors understand this matter fully, and indorses the policy being pursued."

In a report made by the president to the board of directors, on the 23d day of March, 1876, he refers to the amount necessary to pay off the "debts against the company," except certain mortgages and bonds, "excluding, of course, the amount that will be due on the Mobile depot property, when we *agree* to take it." A committee of the directory, appointed by that body to examine into its affairs, reported to the directory on the same day, and used this language with reference to the property:

"We have also examined the company depot at Mobile, and

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the adjacent property which the old company had contracted to buy, but which the new company are under no obligations to accept and pay for. The location is suitable, and it may be desirable that the company shall ultimately own this property, on which some payments have been made by the old company. But we find that real estate in Mobile is depressed in value, and we believe nothing will be lost by a "masterly inactivity"—awaiting as long as possible; this policy being also best adapted to the present means and ability of the company. At present, the sellers cannot make us a clear and perfect title to the property, there being some prior claims and entanglements. Meanwhile, the company is in possession, and its possession cannot be disturbed—probably not for one, two or three years, by which time, the indications are, that this property, or other equally suitable property, can be bought for a less sum than the balance the old company agreed to pay for the property in question—say \$92,750. We believe that by the policy indicated, this or other convenient depot grounds may be eventually secured at about one-half that sum."

In a report made to the stockholders in December, 1876, speaking of the Mobile depot, the president says: "On referring to the financial statements, it will be seen that the debits for this property have been struck from the liabilities of the company."

The special master, after hearing the parties, reported the value of the use and occupation, and the amount of rents collected, and also his conclusion as to the liability of the railway company for use and occupation, in event it abandoned possession, the substance of his report being thus stated by the chancellor in his opinion on exceptions to the report by the railway company: * * * "The master found that the technical relation of landlord and tenant did not exist between the holders of the vendor's lien and the railway company, and the railway company was not liable for rents. In this conclusion the master was correct.

"But he found further, that the intention to repudiate the transaction, and to abandon the possession of said respondent [railway company] is shadowed forth by its answer; and he reports the moment such repudiation and abandonment becomes manifest, the railway company becomes liable to the note-holders for use and occupation of the lands—such use and occupation, however, not to exceed the interest due on said notes; and that when it elects so to repudiate and abandon, a reference should be ordered to ascertain the value of the use and occupation."

The court holding that "when the master found the rela-

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tion of landlord and tenant did not exist between the note-holders and the railway company, all further inquiry as to the personal liability of the company is precluded, and that the only remedy of the note-holders was to sell under the power or file their bill for foreclosure, and apply in time for a receiver to intercept rents and profits *pendente lite*," and thus prevent their going into the hands of the party in possession,—sustained the exceptions to that part of the special master's report as to the liability of the railway company in event of abandonment.

Sustaining this exception to the master's report, is now assigned as error.

P. HAMILTON, for appellant.—The railway company has never paid a cent for this property. It has used it for years without being disturbed, and refuses to pay interest. At first it treated the purchase-money as a debt, reported it among its liabilities, and held on to the property, succeeding to rights acquired by the purchase made of Perry. Latterly, it congratulates itself on possession; denies any liability to any party by reason of that possession; asserts that its possession can not be disturbed for two or three years, and that it can only come under liability by reason of its voluntary acceptance of the purchase, and this, at its pleasure; and till such acceptance, which it proposes to postpone as long as possible, it intends to use its possession to force the holders of the debt for purchase-money to sell it, the property, "at about half the balance now due." These facts give a plain equity to the vendor, or those standing in his place, that the vendee, and those who succeed to his rights and continued in quiet enjoyment of the property, shall either comply with the terms of the sale, or promptly decline to accept, and return the possession to the vendor or his assignee; or, failing in this, make up to the latter the fair value of the use and occupation which those succeeding the vendee have enjoyed.

II. The title in this case was in the vendee, no right of re-entry was reserved by the vendor, and he had no right of possession, and could not maintain ejectment, or other legal action, to recover possession or rents. The right which remained in Perry and his assignees, is an *equity* that the lands in possession of the *railroad*, and those holding its title, shall be applied to the payment of the purchase-money before any beneficial interest shall be claimed by the vendee. The vendor's right is to a lien on the land, the legal title in the vendee. In case of a mortgage, at least after the law day, the legal right is with the creditor, the equity with the debtor;

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here the equity is with the creditor, the legal right with the debtor. In this case, the debtor, and those standing in his shoes, acquired the legal title, clothed with an equity in favor of the creditor, *as to the use and occupation of the property*.

III. The railway company is the mere assignee of the original purchaser, not standing as a *bona fide* purchaser for value without notice. The case shows the relation of vendor and vendee, and the transaction between Perry and the railroad company gives him an "equitable" mortgage. In this case, the equity is distinctly recognized by the declarations of the parties, and does not rest alone on mere legal inference from the facts. Mr. Washburn (*Real Prop.*, vol. 2, 86, 3d edition) says, "the right in such case, which equity raises by way of lien in favor of the vendor for payment of the purchase-money, rests upon the ground that the purchaser is *trustee* of the premises for the vendor till the purchase-money is paid. If I convey land to you and take no collateral security for the payment of the purchase-money, you become a *trustee* for me till the purchase-money is paid." "To the extent of the lien, the vendee becomes *trustee for the vendor*." Perry on Trust, § 232; 43 Miss. 570; 42 Miss. 18. It is clear, therefore, that the railway company, the assignee with notice of complainant's rights, holds this property in *trust* for Perry's assignees. A trust is fastened on the land the *corpus*, and wherein do the profits of the land differ from the land? The legal title and right of possession being in the vendee, how then could complainant assert at law or equity right to the *possession*? Complainant's remedy was in equity, to charge the *trustee* with the value of the rents and profits, or if the trustee used and occupied, then with the value of such use and occupation. Complainant could not recover rent or possession.—52 Ala. 258. The property here was ample for the payment of the interest, and until the notes matured, the complainant could not have obtained a receiver, there being no waste, &c.—*Hughes v. Hatchett*, in MSS.

IV. The railway company succeeded to rights of the railroad company which was under personal liability for the debt to the vendor, and the railway company comes under liabilities to it, at least in equity. There arose an equity, in favor of the railroad company when the railway company took possession, that the latter should perform for the assignor what it had undertaken to do for its vendors, and which the railroad company could no longer perform by reason of the transfer. The notion of a right in this railway company to enjoy this property at the expense of its assignor, or at the expense of the vendor, and without liability of any kind to any person, finds no countenance in any theory of

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equity which can be advanced. "If he (the assignor) enter into no obligation with the party from whom he purchases, neither by bond, nor covenant of indemnity to save him harmless from the mortgage, yet this court, if he receives possession, and has the profits, could, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."—*Waring v. Ward*, 7 Vesey, jr., Rep., 437; *Elliott v. Edwards*, 3 Bos. & Pul. 181, 183; 15 Vesey, jr., 340, 347. Whatever equities the railroad company could enforce against the railway company, with regard to this debt, and which grow out of the contract made for its security, complainant can enforce in equity.

V. The conduct of the railway company shows that it has long since elected to take the property, under the terms under which the railroad company held it. It has had long possession, and not with the view of ascertaining the facts; for it had full knowledge of them. Its purpose in holding possession, was the unconscionable one of getting something for nothing; standing ready to repudiate the contract of sale, all the benefits of which it enjoyed, whenever it was called on to pay. Its right on purchasing the property of the railroad company, was promptly to elect whether to take the property. If it did not intend to take the property, it should have restored it, and not doing this, it is accountable, so long as it remained in possession, for the reasonable value of the use and occupation. It can not take all the benefits of the contract and repudiate all its burdens.—2 Kent Com. 74. The railway company can not be permitted to speculate on the rights of complainant.—*Perry on Trusts*, § 259; *Hill on Trustees*, 219. The reason of this rule is not confined to technical trusts.—*Perry on Trusts*, § 259.

R. INGE & G. L. SMITH, *contra*.—The possession of the railway company was lawful, and its enjoyment of rents and occupation of the property was lawful. These were but the exercise of legal rights, and there was nothing inequitable in it; "for the mortgagor ought to take steps to get into possession" (3 Atk. 44), and if he fails to do so, he can not complain that another exercises his legal rights. His own laches alone prevented putting a stop to rights, the assertion of which is now assailed as inequitable and unconscionable.

II. Perry, and his assignees, can certainly stand in no better position than mortgagees. A mortgagee is not entitled to rent or compensation, until a receiver is appointed, or at

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least until he has demanded possession, and notified the tenant, or sub-purchaser, to pay him rent.—Hilliard on Mortgages, ch. viii; Thomas on Mortgages, p. 301; 9 Ala. 636; 4 Ala. 486; 10 Paige, 47; 33 Ala. 773; Jones on Mortgages, 517.

III. But what was the nature of Perry's rights, and those of his assignees? He expressly reserved a lien for the purchase-money on the face of the deed. It was "an *express* lien by contract," inconsistent with a "vendor's lien," which is an *implied* trust. The taking of a power of sale, in connection with an express reservation, in the deed, of a lien for the purchase-money, only makes the stronger case of a mortgage with a power of sale.—1 Jones on Mortgages, § 229. "It is equal to a mortgage taken contemporaneously with the deed, and nothing more." By Perry's contract was made an agreement which required some action of a court to declare it a mortgage. This contract was not the result of fraud or mistake, but adopted from deliberate choice. The necessities of complainant require that he should have the court enforce his contract as a mortgage. Does this give the court the right to add something not contracted for—a trust to account for past use and enjoyment, under an express conveyance and livery of seizin? Perry did not intend to take or hold the legal title, and without this legal title rents can not be collected until after demand made. The "*trust*," which complainant seeks to have enforced, is express, and all implied trusts are cut off.

IV. Here the railway company went into possession under a conveyance to the old road, and none of the parties are disaffirming the contract.—Code, § 2956. That section of the Code covers the whole of the common law on that subject, and to the extent of conflict repeals it. Perry retained neither a *jus ad rem*, nor a *jus in re*. He had no title or right of possession, after his conveyance. His contract, far from raising an implied tenancy, repels it.—*Tucker v. Adams*, 52 Ala. 258; *Shumate v. Nelms*, 25 Ala. 134. To recover for use and occupation, the relation of landlord and tenant must subsist by an agreement express or implied.—52 Ala. 254; 19 Ga. 313; 11 Pick. 1; 26 Miss. 94; 15 Ill. 61; 2 Hill, 540. It is claimed that *Davidson v. Earnest* (7 Ala. 819), and *Smith v. Wooding* (20 Ala. 327), are opposed to this view. In both of these cases, there was an implied promise to pay rent. Here there was a purchase and sale, and this complainant affirms by his bill, and yet he asks relief which could be granted only on rescinding the sale, and treating the railway company as a tenant! A court of equity has no more power

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than a court of law, to decree for use and occupation, in defiance of the statute.

VI. If the complainant had a "vendor's lien," he would not be entitled to back rents, or to recover for use and occupation, prior to demanding possession, and enforcing his rights by legal remedies.—*Little v. Brown*, 2 Leigh. 35; 3 Iredell Chancery, 311; 5 Humphries, 387. He might, in a proper case, intercept rents accruing *after* the appointment of a receiver. Until he does this, he can not complain that the vendee occupies and uses the property and receives rents. If complainant was entitled to a receiver, he should have pressed his motion. Not doing so was a *waiver* of his right to recover for back rents and use and occupation, even if he had that right, if he had promptly resorted to his remedies. The railway company is a purchaser for value, as much so as if the amount bid for the property had been paid in cash, instead of bonds.

MANNING, J.—This cause is brought before us upon a cross-appeal. It was here before upon a contention different from the one now raised. The question is, whether or not the Mobile & Montgomery Railway Company, purchaser of the property of the Mobile & Montgomery Railroad Company, is bound in equity to pay rent for the real estate in controversy, during the time it had the possession and use thereof, to the holders of the unpaid notes executed for the purchase-money, by the railroad company, to Mr. Perry. Counsel for appellants, the holders of these notes, insist that the railway company is liable for such rents, not exceeding the interest that annually accrued upon the notes. A restatement of some of the facts, will aid us in the solution of the question.

When Mr. Perry conveyed the real estate, lately constituting the depot and its appurtenances, in Mobile, of the Mobile and Montgomery Railroad Company, to that corporation, he expressly reserved in the deed what was called therein "a vendor's lien" upon the property, to secure the payment of the notes given for the price; and he took back from the company its irrevocable letter of attorney, authorizing Perry, or the transferees to whom he should negotiate the notes, to sell, from time to time, so much of this property as should be necessary to pay them. The title he conveyed to the company was not conveyed back to him by a mortgage in regular form. But he was clothed with a power to sell it as an attorney in fact of the company, and in its name, for the purpose of paying the notes.

Now, what was the nature of the interest in the real estate

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in question, that this transaction created in Perry? If it made him, in effect, a mortgagee, and the possessory right of the company was substantially that of a mortgagor, counsel for appellant concede, as we understand, that the company, or the purchaser from it, would not be accountable for the rents until possession of the property was taken, or at least demanded by the mortgagee. But it is contended that Perry had only a vendor's equitable lien, and therefore, the rule in relation to mortgaged property, was not applicable. Whether a different rule would be applicable, if that were so, we need not inquire. It appears to us that by the provisions of his sale, Perry acquired an equitable mortgage.

In the new and valuable work of Jones on Mortgages, it is said: "There are as many kinds of equitable mortgages, as there are varieties of ways in which parties may contract for security, by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage;" that is, of course, if it is not a legal mortgage.—§ 162.

And again he says, upon the authority of adjudged cases: "An express reservation, in a deed, of a lien upon the land conveyed, creates an equitable mortgage; and when the deed is recorded, every one is bound to take notice of the incumbrance. Thus, where land was sold, and for the purchase-money several promissory notes of the purchaser were taken, and these were described in the deed of conveyance and expressly made a lien upon the lands conveyed, a purchaser on execution obtained only on equity of redemption subject to such lien.—Id. § 228.

And in regard to the difference between a vendor's equitable lien and an equitable mortgage, the same author says: "A lien for the purchase-money expressly reserved by the vendor in his deed of conveyance, is a lien created by *contract not by implication of law*. It is a contract that the land shall be burdened with a lien until the note is paid. It is really a mortgage. The lien then becomes a matter of record when the deed is recorded. It is not waived by the taking of other security, as is the case with an ordinary vendor's lien. *It is governed by the same rules that a mortgage is*. It passes by an assignment of the note secured by it. It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after the foreclosure sale."—§ 229.

And of a like lien reserved in a deed of conveyance, Justice BRADLEY of the Supreme Court of the United States, says, it "is equal to a mortgage," and "the purchaser has the equity of redemption, precisely as if he had received a deed

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and given a mortgage for the purchase-money."—*King v. Young Men's Association*; 1 Woods, 386.

These passages are directly applicable to the deed executed by Perry, which is under consideration in this case. The notes for the purchase-money are particularly described in it, and a vendor's lien to secure payment of them, is expressly reserved. The security thus provided by the contract of the parties, is an equitable mortgage. And it is the first case which has come under our observation, of an equitable mortgage, to which a *power of sale* was annexed. This power is conferred by the letter of attorney executed by the company to Perry; and it was intended to pass and be available to the transferees, respectively, of the several notes. But owing to the number of them, and the variety and opposition of their interests, if not also to other difficulties, the exercise of this power became so embarrassed, that the aid of a court of equity was properly invoked, to obtain a sale under its direction.

In this suit, therefore, Mr. Hall and the other holders of the notes stand as mortgagees. The assignment of the notes, carried to them the security, provided for their payment. The Mobile & Montgomery Railway Company, purchaser of the rights and interests of the Mobile & Montgomery Railroad Company, acquired the mortgagor's equity of redemption. And because the property in question, which is subject to some older incumbrances, is not of sufficient value to pay the notes—those mortgagees, appellants in this cause, claim rents of the railway company, at least to an amount not exceeding the annual interest on the notes.

But why should the railway company's obligation depend upon, or to any extent be regulated by the interest that accrued on these notes? With the mortgagor's notes or the interest due upon them, one who purchases his equity of redemption in the mortgaged property, without any stipulation on his part to pay them, need have nothing whatever to do. They are not the measure of any liability which the law casts upon him; for he does not by his purchase become personally liable for the mortgage-debt. He may give up the property at any time in satisfaction of the lien.—*Jones on Mort.* § 738, and cases referred to.

Even if the purchaser of an equity of redemption take a deed of it, which expressly declares it to be conveyed subject to a specified mortgage, he does not thereby become liable for the mortgage-debt. To create such a liability, there must be words which clearly import that the grantee assumed the obligation of paying the debt.—§ 748, and cases cited. But there is nothing in the transfer in this case, from

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the railroad company to the railway company, which obliges the latter to pay any debt of the former company to anybody.

The learned counsel for appellant, Hall, spoke of the railway company, as if it were a mere voluntary grantee of the property, almost as an intruder without any right, legal or equitable. In this he was incorrect. That company was composed of the holders of the bonds of the railroad company. It owed them money to a very large amount. And being unable to obtain payment, they purchased with these bonds all its railroad property and rights of property under the mortgage made to secure payment of them. Between the two companies, at least, there was an ample and valuable consideration. And the railway company acquired all the property and rights, to their fullest extent, of the railroad company, without, as we have seen, becoming responsible for its debts.

What were its rights in respect to the rents in question? So long as a mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. He is not liable for rent. Nothing in the law of mortgages is better settled than this. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the property. And this is true of a railroad as well as of any other property. If the mortgagees want it, they must take possession of the property, or pending a bill to foreclose the mortgage, apply for the appointment of a receiver. And even a receiver, when appointed, cannot recover income then in the hands of an agent of the mortgagor, which accrued before the receiver was appointed.—*Noyes v. Rich*, 52 Maine, 115. See, also *Railroad Company v. Cowdrey*, 11 Wallace, 481.

Appellant's counsel has very forcibly and earnestly presented his views of the abstract rights of the parties to this cause. We cannot adopt those views and apply them as rules of law, without departing from some of the best established principles in the law of mortgages, and attempting to navigate narrow seas without regard to the charts made after numerous and careful explorations, by which our course should be guided.

In respect to the extracts from the reports of the President of The Mobile & Montgomery Railway Company, to the stockholders, and from the accounts of the corporation: they certainly show that it was supposed, by some of the company's officers, that it was its duty or interest to pay the notes executed to Perry. But these extracts relate to mat-

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ters and things done within the corporation, and in respect to which the members might well express their views, and the corporation retain a record of them, without contracting thereby liabilities to third persons. And a corporation, like an individual, may change its purposes, without violating any legal duty to others. Counsel for appellants did not himself think that the proceedings referred to amounted to an assumption of the railroad company's debt to his clients, and therefore, did not claim that it was bound to pay the principal of that debt; yet the extracts they have produced refer as much to the principal as to the interest. The latter is as much a part of the company's debt as the former, and as distinct an assumption of it as of the principal, would be necessary to make the railway company personally liable for it.

The chancellor committed no error in the particulars indicated by the assignment of error, and his decree must be affirmed.

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Bill in Equity for Final Settlement of Estate, and to charge Estate of Surety for Devastavit by Administrator, &c.

1. *Non-claim, statute of; what within influence of.*—Every claim, arising from a breach of contract, is within the operation of the statute of non-claim; though where the contract involves only a contingent liability, the claim may not accrue until the happening of the contingency, and does not fall within the statute until that time.

2. *Same.*—The liability of a surety on an administration bond, for a devastavit committed in the life-time of his principal, is strictly matter of contract, and is absolute, not contingent; accruing at the time of the devastavit, and not at the time of its subsequent judicial ascertainment.

3. *Same; what will not dispense with presentation.*—Knowledge on the part of the personal representative, of the existence of a claim, no matter how full and complete, is not equivalent to presentment, and does not dispense with the necessity of a presentment to avoid the bar of the statute of non-claim.

4. *Presentment; who can not make.*—A presentment of a claim within the statute of non-claim, can only be made by a party who has an interest in the claim, and a legal or equitable right to enforce it; a presentment by an administrator whose appointment is absolutely void, will not avoid the operation of the statute.

5. *Grant of letters; when void.*—A grant of letters of administration *de bonis non* is a nullity, when the order removing the administrator in chief is void; and it confers on the person so appointed no authority to make presentment of claims due the estate.

6. *Non-claim; statute of; what will not avoid.*—A report of insolvency by an administrator founded on his knowledge of claims, or on a presentment by

58	25
101	301
58	25
108	127
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117	508
117	508
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120	220
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135	520

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one who had not authority to make it, will not avoid the bar of the statute; though on such report the estate is declared insolvent.

APPEAL from the Chancery Court of Wilcox.

Heard before HON. CHARLES TURNER.

The original bill in this cause was filed on the 6th day of March, 1873, by the appellee, E. N. Jones, as administrator *de bonis non* with the will annexed of Charles Satterwhite, deceased, against the appellant, John R. McDowell, as administrator of the estate of D. C. Sellers, and numerous other parties.

Its main purpose was the removal of the administration of the estate of Satterwhite into the Chancery Court, and its final settlement there, and in connection therewith, the settlement of the administrations of F. S. McGuire and John W. Satterwhite, former administrators in chief, and a decree against the surviving administrator and the sureties on the administration bond for the amount found due.

It also sought to set aside certain sales of lands made by the administrators in chief during the late war, and charged various devastavits committed by them from the year 1861 up to the year 1867, alleging, among other things, that they sold in 1861 large amounts of personal property, without any necessity therefor, receiving payment in Confederate currency, which was of no value to the estate; that they took no security on the notes given for the purchase money of lands sold under order of the Probate Court, and of which they themselves purchased a large portion; that they made illegal investments in Confederate bonds, and on a partial settlement in 1867 fraudulently claimed, and were allowed credit, for Confederate money on hand, which, it was alleged, they collected from themselves after the war, alleging that they had paid the same for the purchase of the lands. Their accounts filed on this settlement, showed large investments in Confederate bonds, for which they were allowed credit. The bill also made the purchasers of the lands and the heirs and legatees, parties defendant. The case made by the bill and answer, and exhibits, so far as is material to the present controversy, is as follows:

Appellee's testator, Charles Satterwhite, died testate in Wilcox county, Alabama, in the year 1860, leaving a large estate, consisting of lands, about \$60,000 in money, and much other personal property; the debts not exceeding five thousand dollars. On the 24th day of November, 1860, F. S. McGuire and John Satterwhite were appointed and qualified as administrators, with the will annexed, giving a joint administration bond, on which Sellers, appellant's intestate,

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was a surety. Under this appointment, they came into possession of Satterwhite's real and personal property. Both administrators acted as such, after their qualification, until the death of John Satterwhite in 1867, after which, as the bill alleges, "McGuire failing to give an additional bond, as required by the Probate Court, on the 24th day of January, 1870, at an irregular term of the Probate Court of said county of Wilcox, an order was made removing him from the administration of said estate, and De F. Richards, as sheriff of said county, was appointed administrator *de bonis non* with the will annexed of said estate, and on the 25th day of April, 1870, the court stated an account against the administrator, because of his failure to file accounts and vouchers for a final settlement, within one month after its order removing him, and appointed the second Monday in June, 1870, for the hearing." In August, 1870, McGuire made a settlement with Richards, on which a decree was rendered against said McGuire, as surviving administrator, &c., in favor of Richards as administrator, &c., for \$47,336.88. The bill further alleges, that an appeal was taken to the Supreme Court by said McGuire, and the decree of said Probate Court was reversed, and the case remanded on account of his removal at an irregular term of the Probate Court. After said order removing said McGuire was reversed by the Supreme Court, on the 14th day of October, 1872, at a regular term of the said Probate Court, "McGuire was again removed from the administration of said estate, by order of said Probate Court, and on the 14th day of November, 1872, orator was appointed and qualified as administrator, &c., but said McGuire has never made any final settlement."

The bill further alleges that "Sellers departed this life in Wilcox county, on the ———, 18—, and John R. McDowell was duly appointed administrator by the Probate Court of Wilcox, and qualified as such, and is now administrator *de bonis non* of said estate, and within eighteen months after the death of said Sellers, a copy of the bond of said McGuire and said Satterwhite was presented to said John R. McDowell, as administrator of the estate of said D. C. Sellers, by your orator, as attorney for D. F. Richards, the administrator *de bonis non* with the will annexed, of the estate of Charles Satterwhite, deceased, to-wit, on the 8th day of October, 1870; and that afterwards a copy of said bond, on the 11th day of September, 1871, within eighteen months after the grant of letters of administration to said John R. McDowell, was filed for presentation against the estate of D. C. Sellers, in the office of the Judge of Probate for Wilcox county, and also a decree rendered August 8th, 1870, in said court,

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against F. S. McGuire as surviving administrator with the will annexed of Charles Satterwhite, in favor of D. F. Richards, administrator *de bonis non* with the will annexed. In consequence of the presentation of said claim by your orator, the estate of D. C. Sellers was reported insolvent by McDowell, as administrator, and was on the 8th day of May, 1871, declared insolvent by the Probate Court, and said John R. McDowell was continued in the administration of said estate as administrator *de bonis non*, and afterwards on the 18th day of September following, a copy of said decree and bond, verified as required by law, was filed in the Probate Court for Wilcox county, against the insolvent estate of D. C. Sellers, deceased." It further appears that on the 10th day of December, 1870, the appellee, Jones, as administrator *de bonis non* filed a copy of the bond in the Probate Court, as a claim against the estate of Sellers, making oath that he believed the estate of Sellers was indebted on account thereof to the estate of Charles Satterwhite, in the sum of fifty thousand dollars.

The bill required the defendants to answer on oath, and McDowell so answered. He admitted the death of appellee's testator, and the appointment and qualification of the administrators in chief, and the giving of a joint administration bond on which Sellers was surety; that both of them acted as administrators until the death of John Satterwhite in 1867, and that McGuire continued as sole surviving administrator, and denied all knowledge of the alleged *devastavit*s imputed to them. He also admitted that "the death of Sellers happened about the time stated in the bill," which does not give any date, and showed that he was duly appointed and qualified as Seller's administrator on the 13th day of December, 1869. He insisted that McGuire continued as sole surviving administrator after the death of John Satterwhite until the legal removal of McGuire by the Probate Court on the 14th day of October, 1874; that the previous orders removing McGuire and appointing De F. Richards administrator *de bonis non* of Charles Satterwhite's estate were mere nullities; that thereby Richards never became such administrator, and never was authorized to present claims in its favor. He denied that Sellers' estate was ever bound to Richards, as administrator or otherwise. He, in effect, admits presentation by Richards as charged in the bill, but alleges that such presentation and filing were made by Richard's claiming to be administrator *de bonis non*, &c., when he never was such administrator, and while McGuire was in truth such administrator. He admitted that the estate of Sellers had been declared insolvent, though, as he

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stated, not bound for any debts due by him on his own account, and averred that it would be entirely consumed, if held liable for the claim preferred by the bill. He filed objections to the claims when presented in the Probate Court. He now pleads the statute of non-claim, and also that the claim properly verified, had never been filed in the Probate Court, as a claim against the insolvent estate, within the time prescribed by law.

The cause was submitted, as the chancellor's decree recites, on "pleadings and proof." He made a decree assuming jurisdiction of the administration of Satterwhite's estate, and ordered a reference to state the accounts, &c. Afterwards, in a decree confirming the register's report, the chancellor found that the claim against Seller's estate, upon the bond of McGuire and Satterwhite, had been duly presented against the estate of Sellers, and thereupon rendered a decree in favor of appellee against appellant McDowell, as administrator *de bonis non* of Sellers, and others, for \$62,071.55, the amount found due, which was ordered to be certified in the Probate Court. The final decree also granted relief against other parties, on matters which need not be here noticed.

McDowell alone appealed, and without any objection being raised on that account, the appellee joined in the assignment of error.

The rendition of any decree against McDowell, and the finding that the claim had been duly presented against Seller's estate, are now assigned as error; and also certain other proceedings in the cause, which need not be noticed further.

PETTUS, DAWSON & TILLMAN, and COCHRAN & DAWSON, for appellant.—Construing the averments of the bill with the answer, it seems clear that Richards was never administrator. It appears from the bill that McGuire was removed at an "irregular term," and afterwards a settlement was had between Richards and McGuire, whom the Probate Court had attempted to remove, and a decree was rendered in Richards' favor as administrator *de bonis non*. On appeal from this decree, the bill states that it was reversed, on account of the removal of McGuire at the "irregular term." That order of removal was thus assailed on collateral attack, and yet the court held it void; and in reversing the decree as it did, necessarily decided that Richards was not administrator and could not bring McGuire to account. It was thus shown that McGuire had never been removed, and consequently Richards had never been appointed, and McGuire

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was administrator when the alleged presentment was made.—*Boynton v. Nelson*, 46 Ala.; *Matthews v. Douthitt*, 27 Ala.

2. Richards, never being administrator, had no interest in or claim against the estate. He was a mere stranger, and his presentment could not amount to more than the giving of information to the administrator, by any other stranger. Such knowledge, "no matter how full and complete," could not amount to a presentment.—*Jones v. Lightfoot*, 10 Ala. 17; 12 Ala. 193; 10 Ala. 992. Nothing short of a presentment by one having an interest, will avoid the statute of non-claim. The presentment is in the nature of a suit, to which there must be parties having an interest.

3. Whether the defaults of the principal, for which the surety's estate was sought to be held liable, were judicially ascertained or not, the statute of *non claim* operates a bar to relief.—*Fretwell v. McLemore*, 52 Ala. 124. The appellee can not adopt Richards' acts, and by "ratification," after the bar has become complete, revive the claim. To allow this would be to allow him to defeat rights vested in others.—*Cook v. Tullis*, 18 Wallace, 332; *Wood v. McCain*, 7 Ala. 800; *Dearing v. Lightfoot*, 16 Ala. 28. To enable Jones to ratify, he must either have been able to do the act at the time it was attempted, or at the time he ratifies. Jones was not administrator when the presentment was attempted; he could not make a valid presentment after his appointment, the claim being then barred. Hence he could not ratify.—10 Wallace, 676; 18 Wallace, 332.

4. The proceedings for the removal of McGuire and the subsequent proceedings had therein, were in no sense a suit on this claim against Sellers or his estate. Neither he nor his administrator was a party; and of course they can not dispense with the necessity for a filing or proper presentment.

JONES & JONES, S. J. CUMMING & R. GAILLARD, for appellee.—Richards was an administrator *de facto* if not *de jure*.—*Hooper v. Scarborough*, 49 Ala. 137. In presenting the claim, he was confessedly not acting for himself; he was acting for those having beneficial interests in the claim. He was but a trustee for them. This was the legal effect of his acts. The doctrine of principal and agent does not apply, strictly speaking, to the case. "An act professedly done for another person, though without any precedent authority from him, becomes his act, if subsequently ratified by him."—Smith's Manual of Common Law, and authorities there cited.

2. The claim was properly presented, if filed against the
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estate of Sellers within nine months after it "accrued." This claim did not accrue, until the decree of final settlement in this cause.—15 Ala. 221; 24 Ala. 417. There was no judicial ascertainment of any liability on the bond, until the decree in this cause.—*Gilbreath v. Manning*, 24 Ala. 418; *Thompson v. Searcy*, 6 Port. 393; *Dean v. Portis*, 11 Ala. 104; *Kyle v. Mays*, 22 Ala. 673.

3. A claim on which a suit is pending is not required to be filed.—*Ervin v. McGuire*, 44 Ala. 506; *Dolberry v. Trice*, 49 Ala. 207. We insist from the time of McGuire's removal, and his being cited to make a settlement in 1870, a suit was pending about this very claim, which continued until the filing of this bill. Although in a strict technical sense Sellers was not a party to the suit, the result of it would be a decree on which, after return of no property, execution could issue against him.

4. If Richards was neither a *de facto* or *de jure* administrator, he certainly acted for some one. He had no personal interest in the matter. He acted for those whom he believed he was authorized to act for. The claim was certainly presented. If the legatees and succeeding administrator found no fault with his act—if they looked upon it as an act done in their interest, and assented to it, what concern is it to McDowell about the technical relation, from a legal standpoint, which Richards bore to them? The election to affirm or disaffirm that act was vested in those beneficially interested in Satterwhite's estate, and not in McDowell. Besides this, the claim having been presented, if defective before, was cured when Jones filed his affidavit to its correctness. This would make it good under the rule declared in *Ervin v. McGuire*, 44 Ala.

BRICKELL, C. J.—The demand preferred by the bill against the intestate of the appellant, is founded exclusively on his suretyship on the bond of the administrators with the will annexed of Charles Satterwhite, deceased. Independent of that bond, and the breaches of its condition, by the *devastavit* imputed to the principals, there is no equity averred to charge the intestate of the appellant. The claim is then matter of contract strictly, and the liability of the intestate to answer to it, is absolute, not contingent.—*Pratt v. Northam*, 5 Mason, 95. There is no claim arising from a breach of contract, not within the operation of the statute of *non-claim*. There may be contracts, involving only contingent liability, or dependent upon the future performance, or the happening of some particular event, of some act or duty, by the person to whom the promise is made, or by some

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other person, not falling within the operation of the statute. Or, there may be claims not within its operation, because they do not accrue, until the doing of some act by another, after the grant of administration. When the act is done, and the claim has accrued, the bar of the statute is computed, not from the grant of administration, but from the doing of the act, and the accrual of the claim. The familiar illustration, is, the payment by a surety of the debt of the principal. The claim of the surety for reimbursement arises only on making payment, and from that time his claim falls under the bar of the statute.—*Neil v. Cunningham*, 2 Port. 171; *McBroom v. Governor*, 6 Port. 32; *Winter & Gayle v. Br. Bank Mobile*, 23 Ala. 762. Of the former class, *contingent claims*, is the liability of an endorser of a negotiable promissory note. The contract of indorsement, in its nature and terms, is *conditional and contingent*, imposing no liability, and no right to demand from the indorser, until the indorsee at maturity makes demand of the maker, and he fails to pay, of which due notice shall be given the indorser.—*Cockrell v. Hobson*, 16 Ala. 349. Or, as in the case of *Pinkston v. Huie*, 9 Ala. 252, which was strictly a contingent demand, dependent on future events that might never happen. The liability of a surety on an administration bond, is contingent, until the principal shall fail in the performance of a duty required of him by law. But whenever there is a failure, it is absolute, and he is bound to answer to those having the ultimate interests in the assets, for whatever injury they may sustain from the breach of the condition of the bond. The modes of enforcing the liability may vary, as the remedy pursued may be in law or in equity. This does not change the character of the liability; that is fixed by, and is determined from the nature and terms of the bond, and not by the remedies which may be pursued for its enforcement. In *Jones v. Lightfoot*, 10 Ala. 17, it was held that a monied demand, dependent for its existence on the reformation by a court of equity, of a written contract, was within the operation of the statute; that it could not be regarded as accruing only on the rendition of the decree correcting the mistake, though such decree was necessary to give a right of action for the demand. The court say: "A contingency, excepted from the operation of the statute, cannot depend upon the action of the court in granting or refusing relief. If the party is not entitled to a judgment, or decree, at the hands of the court, he has no claim against the estate, and there is an end of the controversy. If he is, it cannot be considered as contingent, whether it will be granted or refused. In this case, upon establishing the fact of mistake in the deed, and

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the injury consequent thereon, the redress was as certain as upon an instrument in writing for the payment of money. Whether a claim exists or not, does not depend upon the proof by which it is established, or the forms in which relief must be sought, and indeed, the argument, if allowed, would go the entire length of repealing the statute."

The *devastavit* the bill imputes to the principal was committed in the life of the surety. The right of action of the legatees, whose representative for the purposes of this suit, the appellee is, was complete before the death of the surety. The Court of Probate, on their application, could have compelled a final settlement of the administration, and the distribution of the assets. Or, a court of equity would have entertained a bill for a settlement of the administration and distribution, against the administrators and their sureties, rendering decrees against them jointly, for the defaults of the principals.—*Moore v. Armstrong*, 9 Port. 697. If the remedy had been pursued in the Court of Probate, during the life of the surety, the decrees rendered against the principals would have been conclusive on him, and the foundation for immediate suits at law on the bond, against principals and sureties. Or, executions could have issued against the principals, out of the Court of Probate, and on a return of *no property found*, then execution could have issued against principals and surety. The liability of the surety accrued as a claim, by the *devastavit*. It was not dependent on a future contingency, or on a condition, or event which might never happen. It was not the subject of a suit at law, nor was there any right of action at law against the surety, until the *devastavit* had been established by a judgment or decree against the administrators. A claim may fall within the operation of the statute of *non-claim*, though the right of action thereon has not accrued. It is enough, that the claim, the right to demand in the future, certainly exists.—*King & Barnes v. Mosely*, 5 Ala. 610; *Jones v. Lightfoot*, *supra*. Otherwise, bonds, promissory notes, or other contracts for the payment of money at a future day, would be excluded from the operation of the statute, until their maturity. If there was any uncertainty, it was the uncertainty of establishing the *devastavit*, so as to bind the surety. Such uncertainty is not the contingency which relieves a claim from the operation of the statute. In *Fretwell v. McLemore*, 52 Ala. 124, after patient and deliberate consideration, we held, the claim against the estate of a deceased surety of an administrator, to recover for the *devastavit* of the administrator, committed in the life of the surety, was within the operation of the statute of *non-claim*. This decision has

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been followed since, in *Owen's Adm'r v. Corbitt, Adm'r*, and *Foster v. Holland's Adm'r*, MSS. These decisions are therefore conclusive, that the demand preferred by the bill falls within the operation of the statute; and they are sustained by the decision of Judge STORY, in *Pratt v. Northam, supra*, construing a similar statute of Rhode Island; and by the decision of the Supreme Court of Tennessee, on a similar statute, in *Hooper v. Bryant*, 3 Yerg. 1.

It would not be doubted, that if judgment or decree had been obtained against the administrators, so that the right of action at law on the bond, against them and the sureties would be complete, the claim against the surety would fall within the operation of the statute. Yet such judgment or decree would not enlarge, or in anywise affect the liability of principal or surety. That liability accrued from the unfaithful administration, the breach of the condition of the bond. The judgment or decree simply establishes the right of the plaintiff to sue at law on the bond; no other than parties who have reduced their demands to judgment or decree having the right to such suit. But as is said in *Thompson v. Searcy*, 6 Port. 393, it is not the foundation of the action, and is recited in the declaration, or complaint, only as fact, the existence of which is indispensable to the plaintiff's right of recovery.

The bill proceeds on the supposition, that the claim is within the statute, and consequently avers a presentment was made within eighteen months after the grant of letters testamentary, by the presentment of a copy of the administration bond to the appellant. Such presentment is averred to have been made by De Forest Richards, as administrator *de bonis non*, with the will annexed of the testator, through the appellee as his attorney. The presentment is substantially admitted by the answer, though it is denied that Richards was the administrator *de bonis non* of the testator, or that he had any interest in the estate, legal or equitable, or any right or authority to make the presentment, so as to intercept the operation of the statute of *non-claim*. It cannot be doubted that the appellant, by this presentment, was fully informed of the existence of the claim; but the uniform construction of the statute has been, that knowledge of the existence of the claim on the part of the personal representative, no matter how full and complete, will not avoid the bar of the statute, and dispense with the presentment it requires, either in equity or at law.—*Jones v. Lightfoot, supra*; *Bogg's Adm'r v. Br. Bank Mobile*, 10 Ala. 970; *Pipkin v. Hewlett*, 17 Ala. 291. Such knowledge may, in all cases, be imparted by, or acquired from, mere strangers, who

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are without authority over, or right in, or connection with the claim. To avoid the operation of the statute, it is required there shall be an act done by the creditor or claimant—a presentment of the claim; and it is this act only, which satisfies the words or purposes of the statute.—*Br. Bank Decatur v. Hawkins*, 12 Ala. 755. The presentment must not only furnish the personal representative, knowledge of the existence of the claim, but also knowledge that those having the right and interest, rely on, and intend to enforce it. The knowledge of the existence of the claim may be derived from a stranger, but the further fact of the intent of those in interest to rely on and enforce it, can be derived from them alone, or from their agents.—*Jones v. Lightfoot*, *supra*. It is the knowledge of this last fact, derived from the presentment, the statute authorizes and requires, that furnishes the personal representative with just and legal grounds for resisting applications made for the payment of legacies, or for distribution, after the expiration of eighteen months from the grant of administration; or, if legacies may be paid, or partial distribution may be made, of the necessity of deferring final settlement, and the amount of assets he should retain to await the establishment of such claim. It is a necessity, therefore, the presentment should be made by a party having an interest in the claim, and a right, legal or equitable, to its enforcement.—*Hallett & Walker v. Br. Bank Mobile*, 12 Ala. 193; *Cook v. Davis*, *ib.* 551.

The only connection Richards had with the claim was in the capacity of administrator *de bonis non*, under the appointment made by the Court of Probate, on the 2d Monday in August, 1870. If that appointment was valid the presentment of the claim could have been made by him, as it could also have been made by any of the legatees entitled to distribution. We are, however, constrained to declare that appointment void—a mere nullity; and that the presentment made by Richards was the act of a stranger, which may have given to the appellant notice of the existence of the claim, but did not, and could not, inform him of the further indispensable element of a presentment, *that the estate of the intestate was looked to for payment*.

It is not now matter of controversy in this court that there cannot, within the same jurisdiction, be two valid grants of administration on the same estate, existing at the same time—one or the other must be void.—*Matthews v. Douthitt*, 29 Ala. 373; *Collart v. Allen*, 40 Ala. 155; *Nelson v. Boynton*, 54 Ala. The case as it is presented by the pleadings, and the transcript, from the Court of Probate, exhibited with the

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bill, does not leave the validity of the order removing McGuire from the administration in chief an open question. The bill alleges its invalidity, and further discloses that when its validity was directly presented to this court, on an appeal from a decree rendered against McGuire as a removed administrator, in favor of Richards as administrator *de bonis non*, it was declared void. That order being void, the grant of administration *de bonis non* to Richards was of necessity void. The administration in chief not being vacant, there was no room for an administration *de bonis non*.

The presentment subsequent to that made by Richards, was after the expiration of eighteen months from the grant of administration, and cannot revive the claim the statute has barred. Nor do we think it material that the appellant, because of his knowledge of the existence of the claim, reported the estate of his intestate insolvent. A personal representative may report an estate insolvent whenever he is satisfied the assets are insufficient for the payment of debts. When he makes such report, he files a full statement, not of the claims which may have been presented to him, but of such as *have come to his knowledge*.—R. C. §§ 2178-9. If such claims are not presented within eighteen months after the grant of administration, it is a valid objection to their allowance as claims, entitled to share in the distribution of the assets. Though if filed within nine months after the decree of insolvency, in the Court of Probate, and before the expiration of eighteen months, such filing would operate as a presentment.—*Lattimore v. Williams*, 8 Ala. 428. The report of insolvency does not indicate more than that the appellant had knowledge of the existence of the claim—it does not indicate there had been a presentment of it. In *Jones v. Lightfoot*, *supra*, the testator had set apart a sum of money for the payment of the claim, and the executors had deferred the settlement of the estate, awaiting the issue of a suit involving it, and had employed counsel to defend the suit. These were facts indicating only the knowledge of the executors, that the claim existed. Yielding to the words and spirit, and purposes of the statute, we are constrained to declare the chancellor erred in overruling the appellant's plea of the statute of *non-claim*. As the case is now presented, it is a positive bar to the relief sought against him.

The appeal has been taken and prosecuted by the appellant alone, without joining his co-defendants in the Court of Chancery, and he alone has assigned errors in this court. The appellees, without objection to the mode of taking and prosecuting the appeal, have joined in the assignment of errors. The conclusion we have reached renders it neces-

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sary that the decree as against the appellant, should be reversed, and the bill as to him dismissed. In no other respect and as to no other party, is it disturbed.

NOTE BY REPORTER.—After the delivery of the opinion, the appellee petitioned for a rehearing, and in event that was denied, for a modification of the decree dismissing the bill as to appellant, so as to make it one of reversal merely, and to remand the cause, that appellee might make certain amendments, which would show that Richards acted not merely as administrator, but also as agent of some of the heirs and legatees of Satterwhite. Accompanying the petition were three affidavits tending to establish these facts. The appellant filed counter affidavits, denying these facts. The following response was made thereto :

Per Curiam.—The application for a modification of the judgment rendered in this cause on a former day of the term, so that the cause may be remanded, and the opportunity afforded for an amendment of the pleadings, and the introduction of further evidence, must be overruled on the authority of *Johnson v. Glasscock*, 2 Ala. 249 ; *Mauzy v. Mason*, 8 Port. 211 ; *Rumbley v. Stanton*, 24 Ala. 712.

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Bill in Equity to redeem.

1. *Conditional sale; what constitutes*.—Where there is no debt or obligation to pay, there can be no mortgage. Consequently, when the grantor conveys by absolute deed, with covenants of warranty, and takes from the grantee an obligation in the form of a penal bond, which recites the conveyance, and also that the parties have agreed that the grantor may have the right and privilege to redeem at a stipulated price, and within a specified time, and it is conditioned that the grantee will convey according to the agreement, but does not bind the grantor to redeem, according to the agreement, the transaction is a conditional sale and not a mortgage, although it originated in a loan of money.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. HURIOSCO AUSTILL.

This was a bill filed by one Chambers, the intestate of the appellant, against the appellee Robertson and others, to redeem a certain store which had formerly belonged to Chambers.

The case, made by the pleadings, is as follows : Chambers,

56	37
108	538
110	243
58	37
123	195

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appellant's intestate, being greatly embarrassed and executions being in force against his property, in April, 1867, accepted a loan, proposed by the defendant Hibbs, on the following terms: Hibbs agreed to loan him five thousand dollars with which to pay off the execution against him, which amounted to about forty-one hundred dollars, and also a mortgage held by one Brady on a certain store owned by him in Mobile. Chambers was to pay him twenty-five hundred dollars for the use of the money for two years, give a deed to the store above mentioned, taking from Hibbs at the same time a written agreement to reconvey the store, at any time within two years, upon the payment to him of seventy-five hundred dollars.

The bill charges, that after the deed had been delivered to Hibbs, he gave to one Secor five thousand dollars, with instructions to pay off the mortgage on the store and the amount of the executions against Chambers. In compliance with this request Secor took the money and paid the amount of the judgment and costs, for which executions had been issued. The judgment being larger than anticipated, and not enough remaining to pay off the mortgage to Brady, Secor deposited the balance with one Dorrance, who soon after failed. Chambers called on Hibbs soon after for the remainder of the money agreed to be loaned, and was informed by him of its deposit with Dorrance and of his failure, Hibbs at the same time refusing to pay the amount, insisting that the loss should fall on Chambers. Hibbs, in November, 1868, conveyed the store in controversy to one Charles R. Marxen for the recited consideration of five thousand dollars.

Some time in 1869, Marxen conveyed the property to the appellee Robertson, who was in possession when the bill was filed. The bill charges "that both Marxen and Robertson knew at the time they purchased the store that Hibbs had paid only forty-one hundred and seventy-six dollars therefor." Robertson alone defended, and he denied any knowledge of Chambers' equity.

The chancellor, on the hearing, dismissed the bill, and this decree is now assigned as error.

BOYLES & OVERALL, for appellant.

P. & T. A. HAMILTON, *contra*.—No debt remained from Chambers to Hibbs, and without a debt there can be no mortgage.—36 Ala. 148; 27 Ala. 634; 28 Ala. 226; 12 Ala. 680; 42 Ala. 680; 42 Ala. 32; 2 Edwards' Chy. 147.

STONE, J.—It is unquestionably the law, that parties may
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make their own contracts, in their own terms, and compel their performance as made, or recover damages for their breach, unless they infringe some rule of law, or of public policy. When contracting, they may mould the terms to suit their own conveniences and tastes. The law clothes them with power to buy, to sell, to make and receive mortgages, and to make sales, reserving the privilege to repurchase. Courts are guardians of people who are *sui juris*, not for the purpose of pronouncing their contracts wise or unwise, but for the purpose of protecting them in the enjoyment of their legal rights and civil independence. I profess myself no advocate of any dogma, which says to the citizen, laboring under no civil disability, "This form of contract is more advantageous to you than that, and therefore I will strain legal intendments at the expense of your intention, that you may be relieved of the hardships of a bargain you probably intended to make." The intention of contracting parties, gathered from the terms of their contract, must control in its interpretation, if that intention violate no principle of law. If we fall below this standard, we make contracts rather than interpret them.

A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie. In *McKinstry v. Conly*, 12 Ala. 678, it was said, in effect, that whether a transaction was a mortgage or conditional sale, depended on the inquiry, did the party have a *remedy* for the recovery of the money on a debt? Was there a legal liability which would support an action? And in *Peebles v. Stolla*, at the December term, 1876, we said, "The effect of a mortgage made by one capable in law of executing such contract, is to leave on the mortgagor a personal liability for the residuum of the debt, if, on foreclosure, the property mortgaged fails to yield a sum sufficient to pay it in full. Hence, one of the tests by which to determine whether or not a mortgage was intended, is the existence or not of a debt to uphold it. If there is no debt, there can be no mortgage. On the other hand, security for a debt is incompatible with the idea of a conditional sale."

A mortgagee, it is said, has three remedies, and can prosecute one or all of them. He can sue for the debt, as a debt, can maintain ejectment for the recovery of the premises, and can also maintain a suit in equity to foreclose the mortgage. *Doe, ex dem, v. McCloskey*, 1 Ala. 708. Cumulative authority

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that there must be a debt, which will support an action at law, to uphold a mortgage. See also, *Murphy v. Barefield*, 27 Ala. 634; *West v. Hendrix*, 28 Ala. 226; *Swift v. Swift*, 36 Ala. 147; *Beck v. Blue*, 42 Ala. 32; *Robinson v. Farely*, 16 Ala. 472.

In the present case, it is manifest that Hibbs retained no debt against Chambers. The latter only bargained for the privilege of repurchasing. He was under no legal obligation to do so. Hibbs could maintain no action against him for not paying the money, and could not have foreclosed the contract as a mortgage. The transaction was a sale, with the privilege to repurchase, reserved to the seller.—*Conway v. Alexander*, 7 Cranch, 219; *Flagg v. Mann*, 14 Pick. 467; *Taylor v. Cornelius*, 60 Penn. St. 187; *Weed v. Snow*, 1 Mich. 128; *Knowlton v. Walker*, 13 Wis. 264; *Ruffin v. Womack*, 30 Texas, 332; *Robinson v. Willoughby*, 65 N. C. 520; *Sharkey v. Sharkey*, 47 Mo. 543.

Some authorities are not strictly reconcilable with these views, but we decline to follow them.—See *Heath v. Williams*, 30 Ind. 495; *Dow v. Chamberlain*, 5 McLean, 281; *Pensoncan v. Pulliam*, 47 Ill. 58.

Decree of the Chancellor affirmed.

Tisdale, Ex'or, v. Maxwell.

Action on Promissory Notes and Accounts.

1. *Promissory note payable to two persons; prima facie import of.*—A note payable to two persons, *prima facie*, imports that each has a joint and coeval interest; but it may, nevertheless, be shown that the consideration moved from them in separate and unequal amounts and values.

2. *Same; collections under; when subject of set-off by executor of one of the payees, when such by the other.*—The executor of one of the payees, when sued by the other or another demand, may set-off against him the amount in excess of his share, which the plaintiff collected on such note.

3. *Transaction with deceased person; what does not involve.*—On an issue in such a case, as to the interest which the respective payees had in such a note, the plaintiff is a competent witness to prove the consideration of the note, who owned the property which formed that consideration, and its value; such evidence, on his part, does not involve any "transaction with, or statement by" the decedent, within the meaning of §3058 of the Code.

4. *Same; what constitutes.*—Any understanding between the two, by which the note was made payable to both, or by which the testator was to take certain property turned over by the makers of the note, etc., would involve a transaction with the decedent; and the plaintiff is not a competent witness, in his own behalf, to prove such facts.

5. *Promissory note, giving of; what presumptive evidence of.*—The giving of a note is *prima facie* evidence of the settlement of all previous accounts

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100	625

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between the parties; but no such presumption arises as to notes previously given.

6. *Same; presumption as to ownership of.*—Where a note, payable to two persons (not partners), is found by the executor of one of them, among the papers of his testator, after his death, and is produced on the trial, this is *prima facie* evidence that the note belonged to him in his representative capacity, and was unpaid.

APPEAL from Perry Court of Quarter Sessions.

Tried before Hon. POWHATAN LOCKETT.

This was an action brought by the appellee, Maxwell, against the appellant, Tisdale, as the executor of one W. W. Tarry, to recover the amount of a promissory note made by his testator, on the 8th day of January, 1872, and the balance due upon account between Maxwell and the deceased. On the trial, the appellant introduced in evidence, under a plea of set-off, a note made by Benjamin Ware and Joseph Tarry, and payable to Tarry and Maxwell, stating at the time that he had found the note among the papers of his testator, and that he had been in possession of it ever since; that soon after finding it, he had a conversation with Ben. Ware, one of the makers, who informed him that Maxwell had collected the note. Ware, the maker of the note, was introduced as a witness, and testified that he and his co-maker, Joseph Tarry, had purchased of Tarry and Maxwell two mules, a wagon and harness, and that the note above referred to was given in part payment of the purchase-money, the balance being paid by the sale of a horse to them. That he first applied to defendant's testator to make the purchase, who referred him to the plaintiff, saying he would consent to any trade Maxwell would make with him. He further testified that, after the death of defendant's testator, he had paid all but fifteen dollars on the note to Maxwell. Tisdale also introduced, in support of his plea of set-off, orders to the amount of thirty-two dollars and ninety cents, a draft in favor of one Harwood, drawn by Maxwell, on and paid by his testator, and a due bill in favor of his testator, signed by Maxwell, for eighty dollars, and dated January 7th, 1871. Maxwell was then introduced as a witness in his own behalf, and testified that he was the owner of the wagon and harness and one of the mules sold to Ware and Joseph Tarry. In reply to the question, "what became of the horse which was received in part payment for the wagon, harness and mules," he answered, that "he did not know what had become of it, but that the horse was placed in Tarry's possession, and that he had seen the horse in Tarry's lot." He further testified that he had never sold the horse, or received anything on account of his sale by appellant's testator; that he was living with Tarry at the time the transaction was made.

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This testimony was objected to, on the ground that it related to a transaction of plaintiff with defendant's testator, and that witness was, therefore, incompetent to testify concerning it. This witness, on cross-examination, testified that the property for which the note was given, belonged, in part, to him and in part to defendant's testator, and that he made the trade after consulting with him, and with his approval and consent. Witness further testified, that he had never seen the note of Ware and Tarry from the time of the trade to the date of trial. Harwood was introduced as a witness, and testified, that he did not recollect what was the consideration for the draft in his favor; that Maxwell was the agent of Tarry, and frequently settled Tarry's accounts with him, and that he had no recollection of Maxwell's having owed him that amount of money; that his books showed that about the time the draft was drawn, Tarry owed about fifteen dollars, and he had freight bills against him for about nine dollars. He was then asked, might not this draft have been given by Maxwell in part payment of Tarry's account, and replied that it might have been given for that purpose, but he had no recollection of the circumstances; and, on cross-examination, he said it might have been cashed by him, for the accommodation of Maxwell.

This was, in substance, all the evidence, and the court charged the jury that the giving of the note sued on was *prima facie* evidence of the settlement of all previous indebtedness between the parties, up to its date, and that such settlement included the due bill for eighty dollars, given by Maxwell to Tarry, in January, 1871. This charge was excepted to by the appellant.

On a motion for a new trial, the plaintiff, in obedience to the order of the court, remitted the amount of draft of Harwood, which had been included in the verdict rendered for the plaintiff.

W. M. BROOKS, for appellant.

J. W. BUSH, *contra*.

STONE, J.—The note, or agreement, of December 6th, 1871, by Benjamin Ware and Joseph Tarry, to Tarry and Maxwell, imports, *prima facie*, a joint and co-equal interest in the two payees. This, however, does not preclude proof of the true transaction, and that the consideration moved from them, in separate and unequal amounts and values. And if it be shown that such was the real transaction, then if one of the payees collected more than his share of the claim,

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an action for money had and received would lie against him in favor of the other payee, for such excess of collections. And such excess could also be pleaded and proved as a set-off, against a suit by the party to whom the excess of payment had been made. This, because there is no evidence of a partnership between Tarry and Maxwell.

In the trial of this cause in the court below, it became a material inquiry, how much was the several interest of the two parties, Tarry and Maxwell, in the said note or obligation of Ware and Tarry, and to what extent each had made collections. Maxwell, plaintiff below, was introduced as a witness. He was competent to testify for himself as to all matters involved in the issue, except "transactions with, and statements by" Tarry, the deceased.—Code of 1876, § 3058. It would seem that this question ought, generally, to be of easy solution. Any understanding or agreement between Maxwell and Tarry, by which the note was to be made payable to the two, or, by which Tarry was to take the horse, or, to take him on account of the sum due him, would be a *transaction with* Tarry, to which Maxwell could not testify on his own account. It was competent for him to state the ownership and value of the several pieces of property that made up the consideration, and the fact, if such was the case, that Tarry had possession of the horse, or sold him to another.—See *Cousins v. Jackson*, 52 Ala. 262. The testimony of Maxwell, "that the horse was placed in Tarry's possession," falls within this rule. It was a *transaction with* Tarry, as we understand the bill of exceptions. The court erred in admitting this evidence.

The Court of Quarter Sessions also erred in charging the jury that the giving of the note by Tarry to Maxwell, dated January 8th, 1872, was *prima facie* evidence of the settlement of all previous indebtedness, including the due bill for eighty dollars, given by Maxwell to Tarry, and bearing date January 7th, 1871. The rule is, that the giving of a note is *prima facie* evidence of the settlement of all previous accounts between the parties; but no such presumption arises as to notes previously given.—See 1 Brick. Dig. 297, § 645. The possession and production of the note by Tarry's executor, was *prima facie* evidence that the note was his, in his right as executor, and unpaid.—*Jarrell v. Lillie*, 40 Ala. 271.

The various rulings of the court, in regard to the order for \$25.68, drawn by Maxwell on Tarry, and in favor of Harwood, were rendered immaterial by the *remititur* of that sum made by the appellee, in pursuance of the order of the court. Should the question come up again, we know no reason why any legal facts and circumstances may not be proved, which

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tend to show the consideration of the order, or the fund, if any, against which it was drawn.

Reversed and remanded.

Dawson v. Hoyle.

Bill in Equity to remove Cloud on Title.

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127	431

1. *Mortgagee; twenty years possession by, presumption as to.*—Where prior to the year 1850 the mortgagee took possession of the mortgaged premises, and after occupying them for some time, conveyed absolutely to another, and the possession of the mortgagee and his vendee continued for more than twenty years, without interruption or claim from the mortgagor or his heirs, a sale of the property and conveyance under the mortgage, or almost any thing else, necessary to give repose to the title of the purchaser, will be presumed.

APPEAL from Mobile Chancery Court.

Heard before HON. ADAM C. FELDER.

This was a bill filed by the appellees, Hoyle and wife, against the appellant, Dawson, and the New Orleans, Mobile and Chattanooga Railroad Company, and seeks to remove an alleged cloud on the title to a certain lot, (conveyed by Hoyle and wife to the railroad company,) by reason of a claim of title by Dawson, and to compel the company to pay the stipulated price. The bill charged that Mrs. Hoyle, as the sole heir of one Ashton, owned the property in question by descent from her father; that she had put the railroad company into peaceable possession, and that the claim of title of Dawson was derived from the trustees of the Planters and Merchants' Bank, who never had any title to the property. Dawson answered, setting up a mortgage of the land in controversy by Ashton to the bank in 1842, and a sale and deed to him by the commissioners of the bank in 1850. The evidence shows that, as early as 1844, the bank was in quiet possession of the lot, claiming the same as owner, and that Dawson entered soon after the execution of the deed to him and held possession of the lot until 1870, when the railroad entered. Dawson set up the possession of his vendor and himself for the length of time shown, as a bar to the relief sought. The railroad company filed a cross bill, setting up the title both of Dawson and Hoyle and wife, asking that the court determine who had title to the land, and offered to pay for the same at a price which had been agreed upon with Dawson, if his title was good; at the same time insisting on

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the title derived from Hoyle and wife. The chancellor decreed that the property belonged to Mrs. Hoyle, ordered the company to make payment to her, and enjoined Dawson from setting up any claim to the lot in controversy; hence this appeal.

T. A. HAMILTON, L. GIBBONS and P. HAMILTON, for appellant.—The demand asserted by the bill is barred by the statute of limitations—the possession of the mortgagee after the law day is adverse, and adverse possession for a period of twenty years is a full answer to the bill.—28 Ala. 263; 32 Ala. 93; 2 Cowan & Hill, notes, 319; 21 Wall. 147.

GEORGE N. STEWART, *contra*.

No brief for appellee came to Reporter's hands.

STONE, J.—The evidence in this record shows that the Planters and Merchants' Bank, through its commissioners, was in possession of, and exercising acts of ownership over the property in controversy, for several years before the year 1850. The bank was, certainly, a mortgagee of the property from Ashton, by mortgage executed in 1842, to secure a large debt therein described. There is no positive proof that that mortgage debt was ever paid in whole or in part, but the circumstances tend strongly to show that it never was, unless it was done by a surrender, or sale of the mortgaged premises under the mortgage. In 1850 the bank, by its commissioners, sold and conveyed the property by absolute deed, and for a valuable consideration, to defendant Dawson, who took immediate possession, and remained in uninterrupted possession and control of it until 1870—much more than twenty years after the commencement of the bank's possession, under which he claims. During all this time, there is not a word of claim to the property set up by the heirs of Ashton. If Mrs. Hoyle had even shown a right to the property, her right accrued when the Planters and Merchants' Bank first took possession. True, she was then a minor, but that disability ceased in 1856. The present bill was filed eighteen years afterwards.

After the lapse of twenty years of uninterrupted possession and enjoyment of this property by Dawson and his vendor, we will presume a sale of the property and conveyance, under the mortgage, or almost any thing else, which is necessary to give repose to his title.—See 1 Brick. Dig. 806, 7, 8, §§ 38, 65, 66, 67, 68, 69, 71.

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There is no equity in the original bill, and it should have been dismissed.

The only title the railroad has or claims to this property, is the deed of Hoyle and wife. The cross bill seeks to remove an alleged cloud on the title so acquired from them. We have shown above that they had no title, and they could convey none to the railroad. It results that the railroad has no title to be relieved of impending clouds; and the complainant in the cross bill can take nothing thereby.

The decree of the Chancery Court is reversed at the cost of Alexander Hoyle and the New Orleans, Mobile & Texas Railroad Company, incurred in and about this appeal in the court below and in this court, and the original bill is dismissed at the cost of Alexander Hoyle; and the cross bill is dismissed at the cost of the complainant therein.

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Real Action in the Nature of Ejectment.

1. *Tax sale; what law determines validity of.*—The validity of a tax sale depends upon the law in force when it is made.

2. *Same; what essential to validity of.*—Presumptions are not indulged in favor of the regularity of proceedings for the sale of land for non-payment of taxes; and the party claiming title under them, must show that all the substantial requirements of the law, authorizing such sales, have been fully complied with.

3. *Same; what will excuse demand on owner, and search for personally.*—Where the owner of lands remains *bona fide* unknown, after proper effort to ascertain the ownership, it will dispense with necessity for demand on him, or search for personal property.

4. *Same; when lands can not be assessed to "unknown owner."*—Lands can not lawfully be assessed to "unknown owner," if, at the time of making the assessment, the officer had the means of ascertaining, by proper inquiry and search, who the owner was—such as the owner's occupation or open possession, or other information which would make known the owner; and having such means of information, he can not assess the lands to "unknown owner," and sale under the assessment would be void.

5. *Act of February 26th, 1872; what not a compliance with.*—Under the act of February 26th, 1872, "to establish additional revenue laws for the State of Alabama," which governed a tax sale made in July of that year, it is provided that "taxes not entered by the assessor in his assessment books, shall not be collected by the tax assessor, unless an assessment thereof shall have been made and entered by him on the assessment books, both original and copy, under the supervision of the probate judge;" and an entry on a small "supplemental book" by the tax collector, of an assessment against property, to "unknown owner," which had escaped the assessor, no assessment having been made on the assessment books, original or copy, under the supervision of the probate judge, will not uphold such assessment, or a sale made under it.

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108	639
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6. *Mistake in description of lands ; when will avoid sale.*—If there is a material difference in the description of the numbers of lands as assessed and as advertised—as a difference in the range in which they are situate—a purchaser at tax sale, will take no title to the lands thus misdescribed.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES Q. SMITH.

The appellee, Thomas Robinson, brought his statutory real action against the appellant, Mary E. Oliver, to recover a tract of land belonging to her, which had been assessed to "owner unknown," and purchased by the appellee Robinson at a tax sale. Two years having elapsed, and the property not having been redeemed, the probate judge made and delivered a deed of the lands to Robinson, who thereupon brought suit.

A part of the land sued for was described in the tax deed and in the complaint, as the northeast quarter of northeast quarter of section 29, township 17, range 19; but there was no entry made by the tax collector, as shown by said supplemental book, of the lands by that description; "but there was an assessment of northeast quarter of northeast quarter of section 29, township 17, range 18, which the tax collector testified was a clerical error, and meant to be the lands just above named."

On the trial, evidence was offered that the tax collector had ample means of ascertaining who was the owner of the land, but that he neglected or refused to avail himself of it. This evidence, which is fully stated in the opinion, was ruled out on the objection of the plaintiff, and the defendant duly excepted.

In the charge given by the court, the jury were instructed, among other things, "that the failure of the tax-collector to use means which might be had, to ascertain the true owner of the land, can not effect the plaintiff's right to recover, unless there is proof tending to show fraud, and the plaintiff had knowledge of the fraud." The defendant excepted to this portion of the charge, as also to the refusal of the court to receive the proffered evidence, and to give the following written charges, requested by the defendant: "4. If the jury believe from the evidence that the tax-collector had offered to him, means of ascertaining the ownership of the lands in question, and failed or refused to avail himself of such means, then a sale of such lands as unknown lands, is void."

"5. If there is a difference of the description of the numbers of the lands, in the assessment and advertisement for sale of unknown lands, then the tax-title, under a sale of

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such lands, gives no title to the purchaser of such lands undescribed in the assessment."

There was a verdict and judgment for the plaintiff, and the defendant appeals.

The charge of the court, the refusals to charge as requested, and the exclusion of the proof offered, are now assigned as error.

F. C. RANDOLPH, for appellant.

RICE, JONES & WILEY, *contra*.

STONE, J.—The present statutory real action was brought to recover lands which the appellee had purchased at tax-sale—the purchaser relying on a deed from the tax-collector to support his title. The tax-assessor of the county had failed to assess the taxes on these lands for the year 1871, and they were assessed by the collector in the month of January or February, 1872, to "owner unknown." The tract, 240 acres, was sold in July, 1872, and purchased by appellee, for the sum of \$52.50, the amount of taxes, costs, and expenses attending such assessment and sale, for taxes of the year 1871. The tax-collector testified, "that he assessed lands named in complaint, for escaped taxes of 1871, to owner unknown; that he entered such assessment in a small supplemental book, which was produced, and contained assessments of all lands that had escaped assessment and taxation for the year 1871, of both known and unknown owners. That he assessed said lands of unknown owners in no other book than said supplemental book and his sales-book, a copy of which sales-book, or record of sales, he furnished to the judge of probate and treasurer of said county. That he entered said assessment of lands of unknown owners in said supplemental book, because there was no room in back part of the original assessment book—which latter fact he made known to the probate judge and Court of County Commissioners, who furnished witness with said supplemental book, and directed him to make the entry of assessment of lands of unknown owners in said book."

The tax-assessor was introduced and testified, "that he had not assessed lands named in complaint for the year 1871—that they had escaped him." Defendant then offered to prove by this witness that, before the advertisement and sale of said lands by the tax-collector, as lands of unknown owner, he [the assessor] offered to lend to the tax-collector a map or plat of all the taxable lands in the county of Montgomery, showing the owners thereof; which said map was

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made for the private use of witness [the assessor], and was not authorized by the probate judge, or Court of County Commissioners of said county. The said map or plat was shown to the court, and had the lands sued for marked across their face, with name of defendant as owner. Witness testified that the tax-collector, Robinson, refused to make use of said map or plat, saying he had a better one." This testimony was ruled out, and defendant excepted.

In the revenue law, which was in force at the time this assessment was made—Pamph. Acts, 1868, p. 227—are the following provisions :

Section 31. "That the assessors shall give at least fifteen days notice, by bills posted at five or more public places in each election precinct, and twenty days notice in the official newspaper for the county, of the time and place, in each election precinct, that he will attend to assess the taxes.

Sec. 32. "That upon the failure of the assessor to attend any appointment made by him in any precinct, he shall, after legal notice, fill a new appointment; or, at his option, forfeit all claims to fees from such persons in such precincts as were disappointed by his non-attendance as assessor.

Sec. 34. "That, after the assessor shall have completed his sittings, as required by section 31 of this act, in each year, he shall make a demand, in person or by deputy, upon delinquent tax-payers, or such as have failed to meet him at his appointments, wherever he may find them; and when unable to find them, he may leave a written notice at the residence of each such delinquent, and it shall be the duty of such delinquent to make a return to the assessor before the first day of June following.

Sec. 35. "That having failed to procure from any delinquent a list of taxable property, before the first day of June, the assessor shall ascertain from inquiry, or otherwise, the property and other items of taxation, upon which such person is liable to be taxed, to the best of his information and judgment.

Sec. 38. "That it shall be the duty of the assessor to make out a complete list of all the lands in his county subject to taxation, in a book properly ruled and bound, and beginning with the lowest section, township and range, and proceeding in numerical order to the highest, setting opposite each division, or subdivision of section, the name of the reputed owner thereof; and when the owner is not known, these words, "owner unknown." Such statement or list shall be included in the same volume with the assessment of tax."

If the tax-assessors would conform faithfully to these stat-

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tory requirements, there would be few persons who could escape them; and it would seem that, in the nature of things, but little land would have to be assessed to 'owner unknown.' The 'complete list of all the lands in his county subject to taxation,' together with 'the name of the reputed owner thereof,' set 'opposite each division or subdivision,' which section 38 requires him to make, when considered in connection with his duty to visit every part of the county, would seem reasonably to forbid that there could be much land in any county, the owner, or reputed owner of which he could not easily learn. Possession and occupation of lands, in the absence of all other proof, is *prima facie* evidence of ownership, and is constructive notice to all persons acquiring an adversary interest, of every right, legal or equitable, which such possessor owns.—2 Brick. Dig. 627, §§ 39, 40, 41; *Anderson v. Melear*, Dec. term, 1876; 2 Brick. Dig. 519, § 181. When the owner or claimant, or any one holding under him, is in the actual occupation, the assessor is without excuse for assessing such lands to "owner unknown." While ascertaining, 'from inquiry or otherwise, the property and other items of taxation,' and the value of the same, with a view of assessing the taxes upon it, under section 35 of the act, it would add little or nothing to his labors, to inquire for the reputed owner or occupant of the property, if real estate. And personal property is rarely so disconnected from all possession and claim of ownership, as that the owner is not discovered, at the same time the property is. And the duty of demanding in person, or by deputy, or by written notice, when unable to find them, that delinquents shall make a return of the subjects of taxation for which they are liable, goes still further in disarming the assessor of all excuse for leaving his assessments incomplete. To sum up: it is the duty of the tax-assessor, after giving very ample notice, to furnish to each tax-payer an opportunity to meet him, in the tax-payer's own precinct, under sections 31 and 32 of the act of 1868. He is now required to furnish him two such opportunities.—See Pamph. Acts 1875-6, p. 55, chap. 5, sec. 2. He is also required to make and have a complete list of all the lands subject to taxation in his county, with the name of the reputed owner set opposite each division or subdivision.—Act of 1868, § 38; Act of 1875-6, ch. 5, § 9. Delinquents who fail to meet the assessor at his precinct appointments, are then entitled to demand or notice, under section 34 of the act of 1868; ch. 5, § 4 of the act of 1875-6. After, and only after the observance of these statutory requirements, is the assessor authorized to make the assessment, upon the property and other items of taxation belonging to the delin-

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quent, ascertained from inquiry or otherwise.—Act of 1868, § 35 ; Act of 1875-6, ch. 5, § 5. In addition to the foregoing mandatory injunctions of duty found in the revenue law of 1868, under the act of 1875-6, ch. 5, § 7, it is declared, "That the tax-assessor shall, before he begins the assessment in each year, file in the probate court of his county an affidavit that he will diligently and carefully seek to ascertain each and every article and subject of taxation within his county, and that he will faithfully discharge all the duties imposed on him by law." This oath imposed no new duty upon him. It only solemnized existing duties by the sanction of an official oath.

Section 50 of the act of 1868 declares, "That it shall be the duty of the tax-collector, while engaged in the collection of taxes, to assess the taxes of persons who have escaped the tax, assessor, entering up all such assessments in the back part of the books of assessments for each year." Same provision in act of 1875-6, p. 61, ch. 6, § 7, with slight change. The purpose and spirit of this section were and are, that if persons liable to be assessed, had escaped the tax-assessor, and the tax-collector, while engaged in the collection of taxes, discovered such persons, it was made his duty to assess the same, entering the assessment as the statute provides. The statute then made it the duty of the tax-collector, after giving the required notice of time and place, to attend in each precinct, for the purpose of receiving the taxes due from the several tax-payers.—Act of 1868, §§ 45 and 46. The act of 1875-6, requires him to attend for such purpose, after proper notice, twice in each precinct.—Ch. 6, §§ 2, 3, 4. After filling these appointments, the tax-collector was required, under the act of 1868, § 48, to be present at the office of the treasurer of the county, for five days previous to the first of December, to afford tax-payers a further opportunity of there paying their taxes ; and under the act of 1875-6, to be present at the county site for five days next preceding the first day of January, for the same purpose.—Ch. 6, § 5. After this, it was and is the duty of the tax-collector to make a personal or written demand on the tax-payer, before resorting to coercive measures to collect the taxes—Act of 1868, § 49 ; act of 1875-6, ch. 6, sec. 6. Of course, this notice would be dispensed with, where, after reasonable inquiry and diligence, the owner not being found, it could be safely and conscientiously affirmed that the *owner is unknown*.

In the forced collection of taxes, it is the duty of the collector to first levy upon personal property, if to be found. Act of 1868, § 53 ; act of 1875-6, ch. 6, § 9. Perhaps it was not necessary to search for personal property in this case, as

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the lands were assessed to 'owner unknown.' If the owner was really unknown, and could not be ascertained with reasonable diligence, such would, without doubt, be the rule. The collector could have no guide in such a search. We have stated the rule for the purpose of showing how zealously the law screens lands from unnecessary sale, in payment of taxes.

"Where no personal property can be found, with reasonable search, the tax-collector shall proceed against the real estate of any delinquent tax-payer, in the manner hereinafter provided."—Acts of 1868, § 54; Acts of 1875-6, ch. 6, § 14.

We have shown above that the tax-assessor and tax-collector had many opportunities to learn and know who was the owner of the lands in controversy. If the tax-assessor had observed his plain duty, he would have assessed the lands to Mrs. Oliver; for he had a map of the lands, on which her name was marked as owner. She was probably in possession, and this should have notified both the assessor and collector, while they were ascertaining the value of the land for assessment, that she was the owner. Moreover, the assessor testified, and he was uncontradicted, that he tendered to the collector the use of his map of the lands of the county, with the names of the owners marked across the several tracts, and that the latter declined to accept it, saying he had a better one. It is manifest that proper inquiry and search were not made, to ascertain who was the owner of these lands. Lands can not be lawfully assessed to 'owner unknown,' when the owner is known; and if the assessor or collector, who makes assessment, has, at the time, the means of ascertaining who the owner is—such as open possession by the owner—this is equivalent to actual knowledge, and will avoid a sale made under such assessment.—*Proprietors of Cardigan v. Page*, 6 N. H. 182; *Brown v. Veazie*, 25 Maine, 359; *Ainsworth v. Dean*, 21 N. H. 400.

There is another fatal defect in the appellee's title. The assessment of taxes by the collector was made in January or February, 1872. On the 26th February, 1872, the act was approved "to establish additional revenue laws for the State of Alabama."—Pamph. Acts, 4. By the 8th section it is enacted, "That taxes not entered by the assessor in his assessment book, shall not be collected by the tax-collector; until an assessment thereof shall have been made and entered by him in the assessment books, both original and copy, under the supervision of the judge of probate." The sale in the present case was made more than four months after the enactment of this statute, and the record proves the requirements of this statute were not complied with.

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That portion of section 87 of the revenue law of 1868—page 325—which declares that a deed made pursuant to a tax sale, shall be conclusive evidence of certain prerequisite facts, seven in number, has been repeatedly adjudged unconstitutional by this court.—See *Davis v. Minge*, December term, 1876. The facts, of which it is declared to be *prima facie* evidence, are not involved in the questions discussed above, and exert no influence in their solution.

In a sale of land for taxes, great strictness is required. To divest an individual of his property, every substantial requisite of the statute must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cure any radical defect in his proceedings; and the proof of regularity devolves upon the person who claims under the collector's sale.—See 2 Brick. Dig. 469, §§ 28, 34, 35, 38.

In *Brown v. Veazie*, 25 Maine, 359, it is said, "To make out a valid title to land sold to obtain payment of taxes assessed thereon, the purchaser under a collector's sale must show that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with." See *Shimruin v. Inman*, 26 Me. 228.

In *Cooley on Taxation*, 324, that profound jurist summarized the doctrine on this subject in the following forcible terms: "Tax sales are made exclusively under a statutory power. The officer who makes them sells something he does not own, and which he can have no authority to sell, except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails, it is as fatal as if all failed. Defects in the conditions to a statutory authority can not be aided by the courts; if they have not been observed, the courts can not dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions; and, presumptively, any other execution is opposed to the legislative will, instead of in furtherance of it. It is, therefore, accepted as an axiom when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance

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with the law, in all the proceedings of which the sale was the culmination. This would be the general rule in all cases, in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales.

In the charge of the court given, and excepted to by appellant, and in refusing charges 4 and 6, requested by appellant, the Circuit Court erred.

There was also error in rejecting the proof offered to be made by the tax-assessor.

The law affecting the questions described above, has been changed by the act "To provide for the collection of delinquent taxes," approved February 9, 1877.—Pamph. Acts, 20. That statute does not affect this suit.

Reversed and remanded.

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Proceeding to vacate Charter.

1. *Demurrer, ruling of court on; when not revisable.*—Rulings upon demurrer not shown otherwise than by recitals in the bill of exceptions, cannot be revised on appeal.

2. *Misuser or non-user; who may institute proceedings against corporation for.*—Under the act of 1843 (Clay's Dig. 515, § 39) the solicitor of the circuit was authorized to institute proceedings to have a declaration of forfeiture against a private corporation for *misuser, or non-user*, only at the *instance of* and in behalf of the State; and hence it was held the solicitor could not institute such proceedings at his own volition, but only on the direction of the Attorney General or the Legislature.

3. *Same; who may institute proceedings, under §§ 3419–20 of Code.*—Under the statute, subsequently adopted and now forming a part of the Code (§§ 3419–20) it is provided that such action may be brought on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the same is brought, and whenever security for costs is given and approved by the clerk, any person may institute and prosecute proceedings in that court, under § 3420 of the Code.

4. *Charter of private corporation; proceedings to vacate charter of.*—Although individuals having no special interest in private corporations, may institute proceedings for their dissolution, yet the proceedings are something more than a mere private suit, and are conducted in the interest of the State, no matter by whom brought; and the relator cannot confess error or dismiss the suit, without leave of the court before which the proceeding is pending.

5. *Tuscaloosa Scientific and Art Association, act incorporating; what does not authorize.*—There is nothing in the provisions of the act to incorporate the Tuscaloosa Scientific and Art Association, for the purpose of encouraging science and art and aiding the University of the State in replacing its library and establishing a scientific museum, approved February 3d, 1866, which

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gives any warrant for setting up a lottery, or the selling of tickets authorizing the winner to demand money in the first instance.

6. *Same; rules furnished agents by; admissibility of.*—Where the corporation issued and furnished rules to its agents for their guidance, in conducting the scheme of awards and prizes authorized by its charter, the corporation may introduce them in evidence, when a forfeiture of the charter is sought for violations of the charter by its agents; it being for the jury to determine, in view of the evidence, whether it was the *bona fide* purpose of the corporation to be governed by such rules, or whether the rules were mere machinery to give the conduct of its business a show of legality, violations of which by agents were acquiesced in, or connived at by the officers in charge of its affairs.

6. *Witness; what jury may look to, in determining weight of testimony by.*—In determining the weight to be accorded to the testimony of a witness testifying to violations of its charter by the defendant corporations, the jury may look to the fact (if they find such to be proved) that the proceeding was the result of a combination between the owners of two other rival lotteries, and such witness was interested or concerned in either of them.

8. *Forfeiture of charter; what not ground for.*—Where the corporation has given instructions to its agents, in accordance with its charter, for their guidance in conducting its business as prescribed by such charter, violation of these instructions by the mere agents of the corporation, without the knowledge of the corporation, is not ground for a forfeiture of the charter.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

This was an information filed by the State in the relation of A. O. Murphy against the Tuscaloosa Scientific and Art Association, for the purpose of having their charter declared forfeited for misuser. The information alleged that the Association was formed for the purpose of distributing articles of art and science, and that by its charter it was authorized and empowered to receive subscriptions and to sell and dispose of certificates of subscription which shall entitle the holder thereof to any articles which may be awarded to them; but the act provides that such distribution of awards shall be fairly made in public after advertisement, by lot, chance or otherwise, at its office in Tuscaloosa or at any other convenient place that may be selected by the said corporation. The charter further provided, that before any distribution the corporation should advertise a list of all the articles to be drawn for, with the value of each article. The Association was, by its charter, allowed to distribute paintings, scientific instruments, and anything useful or ornamental, "*save and except money or legal currency of the United States of America.*" The charter further provided, that if any winner of any of the prizes offered should believe that the prize was not worth the annexed value in money, he should be entitled to an appraisement of the article, and if the value thus ascertained was not equal to the value advertised, he should be entitled to demand and receive from the Association in lieu thereof the money value of the article as advertised, or a sufficient sum in addition to the article, to

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render the amount received by him equal to the value advertised. The information alleged that the defendant, in violation of its charter, and contrary to the criminal laws of the State, was engaged in carrying on a lottery; that the only prizes distributed were money prizes, and that the business of the corporation has been habitually conducted, not in accordance with its charter, but that said charter was used as a contrivance to evade the law and to gamble with the buyer of the ticket or certificate sold by it, for money and for no other thing.

On the hearing the defendant moved the court to dismiss the information, on the grounds: 1st, because it is at the instance of a private relator, instead of the Attorney-General of the State; 2d, it was filed without leave of the court, first obtained; 3d, defendant is not bound to answer the information. This motion the court refused and the defendant excepted. The record contains a demurrer to the information, but the judgment entry fails to show the ruling of the court thereon.

The relator was introduced as a witness, and testified that he had been in the employ of defendant as an agent for the sale of tickets, and the payment of prizes drawn by the holders of tickets sold by him, and that the only instructions received by him in regard to these matters were verbal ones by the secretary and treasurer of the corporation, which did not specify what article should be drawn, but simply related to the sale of certain combinations to be drawn. The witness further testified that he sold the tickets as for a money prize, and that the transaction was so understood by the buyer of the tickets so sold; that he never offered the winners any object of art, or any other thing of value but money; that he had no such thing in his office, and that there was no other form or ceremony in settling for the prize than the demand and payment of money for the prize drawn. He further testified that there was no advertisement in the newspapers of the objects of art to be distributed, and that there was no notice of them in the office where he sold the tickets; but that he had seen a standing placard on a pasteboard in the central office, containing a list of some articles which were never changed. He further testified that in the year 1869, he had an office in the central office of the defendant, and that it was usual during that time to pay the prizes drawn in money, without the offer of any thing and without any other form or ceremony than the presentation of the ticket.

One Ballentine testified that he had been commissioner for the defendant, to see that the drawings were fairly conducted.

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ducted, and that he had, while acting in such capacity, seen a great many prizes paid at the central office of the defendant, and that according to his observation it was usual to offer an article of art or value to the drawer of a prize before paying the prize in money, and that in some instances he had known other articles than money to be given to the winners. He also testified that there were at the central office a considerable number of chromos, pictures, &c., to be used as prizes, and also, that as he understood, arrangements had been made with merchants in the city to deliver, on the order of the defendant's treasurer, any article drawn as a prize. He also testified that agents were instructed not to pay a prize in money, unless upon refusal of the article drawn, and that printed rules to that effect had been generally distributed to agents.

One Lewis testified that he had often bought tickets in the distributions of the defendant, and had drawn several prizes, all of which were paid in money without the offer of anything else, and that he bought his tickets with the understanding that the prizes were to be paid in money. "On cross-examination this witness testified that on one occasion he was told he must sign some paper before he got his money; that he did not know or care what it was, but that he was informed that he must sign it to get his money, and he therefore signed it, but that nothing but money was ever offered him."

One St. Paul, a witness for the defendant, testified that as attorney for it he had been requested to prepare all forms used by it, in conformity with its charter, and that as such attorney he prepared the tickets used, and also a form of refusal and appraisalment. The witness testified that the body of rules and regulations were used by defendant, and that several thousand copies had been distributed, chiefly to agents. This witness further testified, that he had often seen prizes drawn paid in kind, and that on some occasions, where the defendant did not have the articles drawn, they had procured them from dealers and delivered them to the winners of the prizes.

Defendant then offered in evidence the rules and regulations prepared by the witness, St. Paul; to the introduction of which the plaintiff objected, on the grounds, "first, that it was not shown by any record of the defendant, or otherwise, that they had been adopted by the corporation; because, if they were rules and regulations of the defendant's, there was better evidence of the fact than was contained in a mere printed pamphlet, distributed by the defendant's manager; and because the rules were no answer to regular and con-

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stant acts of its agents, known to and approved by it."

The court sustained the objections and excluded the testimony, to which the defendant excepted. There was evidence that the relator had, at one time, been in the employ of the defendant, and that on its failure to give him a better place than agent for the sale of tickets, he had left its service and was, at the time he testified, in the employ of one Moses, who was the owner of an interest in another lottery, known as the Mobile Charitable Association, and between whom and the officers of the defendants there existed a good deal of ill-feeling, growing out of the efforts of defendant to break up the lottery of which Moses was the manager. It also appeared that Moses paid the expenses of this suit, including attorney's fees. There was also evidence that one Boyd, who was interested in another lottery, known as the Mutual Aid Association, had also employed counsel to assist in the prosecution of this suit. This was all the evidence necessary to an understanding of the points decided.

The defendant then requested the following charges in writing: 3. "If the jury believe, from the testimony, that the defendants gave instructions to their agents, and that these instructions were in accordance with its charter, then proof that the instructions were violated by the agents, without the knowledge of the defendants, does not make such acts of the agents the acts of the corporate body and there should not be a verdict of guilty." 9. "If the jury believe, from the evidence, that this prosecution is the result of a combination or conspiracy by and between the proprietors of the Mutual Aid Association, and the Mobile Charitable Association, and that such associations are engaged in the lottery business; and if they believe from the testimony of any witness that he was concerned or interested in either of said associations, that circumstance may be considered by the jury in determining the credit they will give to his testimony." These charges the court refused to give, and the defendants excepted. The various rulings of the court to which exceptions were reserved, are now assigned as error.

[NOTE BY REPORTER.—After the submission of the cause in this court, the attorney for the relator, upon instructions from his client, filed a confession of errors in the record.]

PERCY WALKER, ALEX. MCKINSTRY and HENRY ST. PAUL, for appellant.—This proceeding could only be instituted by the State or by the Attorney-General.—9 Cranch, 43; 4 Wheat. 661; 11 Ala. 472; 19 Md. 239; 5 Mass. 230; *ib.* 423; 8 Peters, 281; 19 Ala. 514. The charges requested by the

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appellant are free from error, and they should have been given.

JOHN W. A. SANFORD, Attorney General, with whom was J. LITTLE SMITH, *contra*.—The Code now gives any citizen a right to file the information upon complying with the requisites of that section.—R. C. § 3080. The case in 19 Ala. arose under a different statute.

STONE, J.—The rulings of the Circuit Court on the demurrer filed to the information are shown only in the bill of exceptions. Our uniform holding is that such question, thus presented, will not be considered.—*Petty v. Dill*, 53 Ala. 641.

A corporation is a franchise. Its privileges are conferred by the sovereignty; and hence, it is defined to be "a branch of the king's (or governmental) prerogative, subsisting in the hands of a subject," or citizen.—2 Blackst. Com. 37; 3 Kent Com. 458; *The State v. Moore & Ligon*, 19 Ala. 514. The power to create private corporations, and to confer on them privileges not enjoyed by the general public, is rested on the public services such corporations are supposed to perform; such as increased facilities to commerce, employment given to labor, and increase of public wealth. Or, when the corporation is eleemosynary in its purposes, the benefaction it proposes to bestow. It is thus shown that the public have an interest even in private corporations, and in their uses and abuses. Based on this idea, this court held, in *The State v. Moore & Ligon*, 19 Ala. 514, that the solicitor of the circuit, of his own volition, could not institute proceedings to have a private charter declared forfeit, for nonuser and misuser. And it is here contended, on the authority of that case, that the present information should not be entertained, because it does not appear that the Attorney-General, or any other competent State authority, directed or authorized the institution of the proceedings.

The case of *The State v. Moore & Ligon*, *supra*, arose under the act of 1843.—Clay's Dig. 515, § 39. That act authorized the solicitor of the circuit to sue out the process therein authorized, "*at the instance of, and in behalf of the State,*" &c. Under the clause we have italicised, this court held that the solicitor could not move in such matter of his own mere volition, but could only act under the direction of the Legislature, or of the Attorney-General. We think the reasoning of our predecessors in that case was sound.

The present case arises under statutory provisions, which were enacted after the case of *State v. Moore & Ligon* was determined.—See Code of 1852, §§ 2651-2; Code of 1876,

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§§ 3419-20. Under this statute, not only may the judge of the Circuit Court direct the solicitor of the circuit to bring the action, but "such action may be brought on the information of any person, giving security for the costs of the action, to be approved by the clerk of the court in which the same is brought." This language is so entirely unlike that of the former statute, that we feel bound to give it a different construction. The Legislature thought they were sufficiently guarding the public against an abuse of its process when they required security for costs. We feel constrained, by the language of the statute, to hold that whenever security for the costs is given and approved by the clerk, any person may institute and prosecute proceedings under section 3420, Code of 1876.

The act, under which the appellant claims the right to carry on its business, has a very attractive caption.—See Pamph. Acts 1865-6, p. 269. "Encouraging science and art, and aiding the University of the State in replacing its library, and establishing a scientific museum," are certainly very praise-worthy purposes. The testimony in the present record tends to disclose the machinery of a lottery, organized and conducted as such enterprises usually are, for the determination and distribution of pecuniary prizes, on the combination principle. Looking into the body of the statute, we fail to find any warrant for setting up a lottery. How far the imposing manifesto has been realized, in the encouragement of science and art, or in aiding the State University in replacing its library, and establishing a scientific museum, or, how far the premiums offered by the Association for essays on science and art, or works of art, or useful inventions, have tended to awaken the creative and inventive genius of the "citizens of Alabama," the record does not inform us. We only know the working of the enterprise in the evidence before us.—See *Marks v. The State*, 45 Ala. 38.

In three particulars we think the Circuit Court erred. There is much testimony in the record, tending to show that the agents and employes of the Association did not follow the rules adopted and given to them for their government; and that these violations of rules were known to, and not disapproved by those having control and management of the corporation. The stereotyped indorsement on what are called "certificates of subscription," indicates very clearly that the premiums and awards sometimes offered to the winners of prizes were not expected to be taken, but that the value in money would be demanded and paid. The appraisement was to be a condemnation—not even a reduction of value—for the printed form affirms "that the articles drawn

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by this certificate are not worth the prices affixed to them." This savors strongly of simulation. A vigilant, faithful administration of the law looks beyond the thin covering, under which violators of legal duty sometimes seek to conceal themselves. The law deals with facts, when they can be ascertained; not with pretexts and disguises. Still, the evidence tended to show that the rules offered in evidence were, at least sometimes, furnished to the agents. The testimony was simply oral; and it was for the jury to determine whether it was the sincere purpose of the company to be governed by the rules; whether they were disregarded by the agents, with the knowledge, connivance, acquiescence, or approbation of those having the management; or whether this was mere machinery, to give to the performance a show of legality. The rules should have been allowed to go the jury, with proper instructions.

Charge, numbered 9, as asked by defendant, should have been given. The circumstances therein supposed, are proper considerations for the jury, in determining the credibility of witnesses thus circumstanced.

Charge No. 3, as asked, asserts a correct legal proposition, and it should have been given. The court could not affirm, as matter of law, that the officers of the Association knew the agents were violating the rules, no matter how strongly the testimony might tend; that was a question for the jury. They must determine whether they believe the evidence or not.

We have said above that the public have an interest in private corporations. They have an interest in such corporations, because they affect the moral and economic conditions of society. These are the considerations on which the franchise is granted or withheld, and they control in the matter of revoking the privilege for misuser. Hence, although private individuals, having no special or peculiar interest, may institute proceedings for their dissolution, such proceedings are more than a private suit. They are brought in the name of the State, although when they are founded on the information of an informer, he must be joined as plaintiff with the State.—Code of 1876, §§ 3419-20, 3425. And in all cases of conviction, whether the proceeding be set on foot in the name of the State alone, or at the instance of an informer, the solicitor is entitled to a fee.—See Fees of Solicitors, § 5047, Code of 1876. This shows that such proceedings are conducted in the interest of the State, no matter how instituted. The relator, in such case, can neither confess errors, nor dismiss the suit, without leave of the court before which it is pending.

Reversed and remanded.

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Action against Sheriff and his Sureties for Failure to make Money on Execution.

1. *Sheriff; when onus lies on, to show diligence.*—Where a sheriff, having process in his hands for that purpose, fails to levy on property in possession of the defendant, or having levied, discharges the levy without selling, and without making the money on the execution, the *onus* is on him to show a legal excuse for his conduct.

2. *Homestead exemption under § 2880 of Revised Code; what necessary to entitle to.*—To constitute a valid claim of exemption under section 2880 of the Revised Code, it must be shown that defendant had a family and that the lands claimed embraced his homestead.

3. *Decisions of Supreme Court of the United States; when binding on State tribunals.*—In the decision of questions which may be carried for revision to the Supreme Court of the United States, this court recognizes the decisions of that tribunal as authoritative and binding.

4. *Exemption law; what unconstitutional.*—A State law which increases exemptions, so far as it applies to debts previously contracted, impairs the obligation of contracts and is void.

5. *Execution; of what is notice to sheriff.*—An execution in the sheriff's hands is notice to him of the time when the judgment was rendered, but not of the time when the debt, on which it is founded, was contracted.

6. *Sheriff; when not liable for releasing property not exempt.*—A sheriff can not be held liable for discharging the levy of execution on property which was claimed as exempt, on the ground that plaintiff's debt was contracted before the enactment of the exemption law, unless it be shown that the sheriff had notice, actual or implied, of that fact.

APPEAL from the Circuit Court of Bibb.

Tried before Hon. GEORGE H. CRAIG.

The appellant Wilson brought this suit against Brown, late sheriff of Bibb county, and the sureties upon his official bond, to recover damages for the failure of Brown to make the money on a certain execution for \$500, besides \$16 costs, placed in his hands, in favor of the plaintiff, against one Thompson.

The judgment, on which the execution issued, was rendered on the 21st day of April, on a debt contracted on the 7th day of January, 1865, and the execution was placed in the hands of the sheriff on the third day of May, 1870, in ample time for him to have made the money before court. Thompson had sufficient property at this time and afterwards to have satisfied the execution, if his property was liable to levy and sale. The bill of exceptions recites that at this time Thompson "was the owner of and in possession of real

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estate, situate in the county, consisting of an undivided half interest in about 720 acres of land, including a grist mill, and water power, and also had the fee title to forty acres of land in said county, which included two lots in the unincorporated village of Six Mile," and the whole of Thompson's interest in the property would have sold for at least one thousand dollars. "Thompson remained the owner in possession of said lands, for some time after the execution came into the sheriff's hands." Brown levied the execution upon all these lands, but Thompson filed an affidavit of exemption, claiming all of said lands as exempt to him under the statutes of Alabama, and Brown thereon declined to sell any part of them for the satisfaction of the execution, but returned it, with the affidavit of exemption, to the clerk of the court from which the execution issued, endorsing thereon that he had not sold the lands, because they were exempt.

This, together with proof of the execution of the bond, the rendition of the judgment on which the execution issued, and the placing of the execution in the sheriff's hands, was all the evidence.

The court charged the jury, "if they believed from the evidence that the lands so owned by Thompson, the defendant in execution, were not worth over one thousand dollars, then they were exempt from levy and sale under the execution in favor of Wilson against said Thompson, and their verdict must be for the defendant," and the plaintiff excepted.

The plaintiff then requested the court to charge the jury, in substance, that under the law applicable to the facts in evidence, Thompson's exemptions of real estate were limited to \$500 in value; and also that Thompson was not entitled to claim any exemption of real estate from sale on execution to satisfy said debt. The court refused to give these charges, and the plaintiff separately and duly excepted to such refusals.

The charge given and the refusals to charge, as requested, are now assigned as error.

JAMES E. WEBB, for appellant.—The court clearly erred in its charge. The evidence shows that Thompson had a half interest in a large tract of land, and also another lot of land in a village. He could not live on both, and could claim a homestead on but one tract. *Sneider v. Heidleberger*, in 45 Ala., is no longer law, if it ever was. The Supreme Court of the United States, in *Gunn v. Barry* (16 Wallace, 610), has decided that exemption laws can not operate on debts contracted before their passage. See, also, opinion of Judge Christian on homestead cases, 12 American Reports, 507;

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Jones v. Brandon, 48 Ga. 595. These authorities conclusively demonstrate the error of the court in its rulings.

CLOPTON, HERBERT & CHAMBERS, *contra*.—In *Sneider v. Heidleberger*, 45 Ala. 126, this court held that section 2584 of the Revised Code applied to debts incurred before its passage. See, also, *Cooley Con. Lim.* 287–8 and notes. The sheriff's return made a *prima facie* case for him, and the *onus* is on the party seeking to impeach it, to disprove its recitals.—2 Denio, 633; 2 Stewart, 255; 6 Hill, 550. The plaintiff failed to prove that Thompson did not live on the land and was not the head of a family, and thus failed to make out his case; besides this, it was not necessary to obtain the exemption given by § 2880, *et seq.*, that he should live on the lands. 45 Ala. 454. There is no evidence that the two tracts did not lie adjoining each other, and Thompson may have lived on both.

STONE, J.—The general rule of law is, that sworn officers, whether judicial or ministerial, are presumed to do their duty; and he who asserts their official dereliction, must prove it, even though such proof be of a negative.—2 Best Presumptive Evidence, § 348, and authorities cited; *Brandon v. Snows*, 2 Stew. 255.

But, when a sheriff, having process in his hands for the purpose, fails to levy on property found in the possession of the defendant; or, having levied, discharges the levy, without selling the property, and without realizing the money he is commanded to collect, a different rule prevails. The *onus* is then shifted to him to show a legal excuse for not levying or selling, as the case may be.—*Smith v. Leavitts*, 10 Ala. 92; *Gresham v. Walker*, *Ib.* 370; *Easley v. Walker*, *Ib.* 671; *Kelly v. Governor*, 14 Ala. 541; *Governor v. Baker*, *Ib.* 652; *Governor v. Campbell*, 17 Ala. 566; *Whitsett v. Slater*, 23 Ala. 626; *Robertson v. Beavers*, 3 Port. 385; *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

The bill of exceptions in this cause, informs us that it contains all the evidence. There is no testimony that Thompson, the defendant in execution, had a family, or that the land in controversy contained his homestead. These are indispensable conditions of a valid homestead claim under section 2880, subd. 4 of the Revised Code of Alabama.—See *Kaster v. McWilliams*, 41 Ala. 302; 1 Brick. Dig. 906–7, §§ 228 to 231; *McGuire v. Van Pelt*, 55 Ala.

Under the rules above declared, the judgment of the Circuit Court must be reversed on several of its rulings, not

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necessary to be particularized.—Ordinance 36, Acts 1868, p. 183, 364.

The debt, to enforce which the execution against Thompson was issued, was contracted before the act of February 19, 1867, became a law.—See Pamph. Acts, 1867, p. 611. That statute was embodied in the Revised Code as § 2884. It provides that, “in addition to the real and personal property now permanently exempted from levy and sale by law, under any legal process, there shall be retained for the use and benefit of every family, twelve hundred dollars of real estate, including the homestead,” &c. The argument is here made that this act is inoperative as to debts previously contracted, because it violates Article I, Section 10, Subd. 1, of the Constitution of the United States, which declares that “no State shall pass any law impairing the obligation of contracts.” This precise question went before the Supreme Court of the United States by writ of error from the Supreme Court of Georgia, in the case of *Gunn v. Barry*, 15 Wal. 610. That court unanimously decided that, as to debts previously contracted, the provision in the Georgia constitution, which increased the homestead exemption from fifty acres to two thousand dollars in value, impaired the obligation of the contract, and was void.

This question is one which can be carried from any State court of last resort, to the Supreme Court of the United States for review, whenever the State court pronounces in favor of the constitutionality of such statute. In other words, that court has a revisory jurisdiction over this court, whenever such decision is here rendered. We hold that the rulings of that court on such questions are authoritative and binding on us. Such has been the course adopted in Georgia.—*Jones v. Brandon*, 48 Geo. 593; *Chambliss v. Jordan*, 50 Geo. 81; *Grant v. Casby*, 51 Geo. 460. In the “Homestead Cases,” 22d Grat. 266, the same conclusion is reached, in a very able argument by Mr. Justice Christian.

We feel it our duty to consider another question. The judgment against Thompson, on which the execution in this case was issued, was rendered April 21, 1870. This fact, no doubt, was noted in the execution. This was notice to the sheriff that Thompson was then indebted to Wilson. It was neither notice or evidence that the debt, on which the judgment was rendered, existed prior to February 19, 1867, the date of the statute we are construing.—*Snodgrass v. Br. Bank at Decatur*, 25 Ala. 161.

Levying an execution, issued on a judgment rendered in April, 1870, we can not hold that the sheriff was charged with knowledge that the debt on which the judgment was

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rendered was contracted before February 19, 1867. To hold him culpable, he should have had notice direct, or of some fact sufficient to put him on inquiry.—*Morrison v. Wright*, 7 Por. 67; *Governor v. Campbell*, 17 Ala. 566; 10 Ala. 671; 23 Ala. 626.

For the errors above pointed out, the judgment of the Circuit Court is reversed and the cause remanded.

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Porter & Co. v. The State.

Indictment for Violation of Revenue Law.

1. *Revenue law; subdivision 15 of § 494 of Code, construed.*—Subdivision 15 of § 494 of the Code of 1876, defining certain occupations for the carrying on of which license is required, which reads as follows: "For dealers in pistols, bowie knives and dirk knives, whether the principal stock in trade or not, fifty dollars," when construed in connection with that section, was manifestly intended to impose a tax on each dealer in pistols, or in bowie knives, or in dirk knives, and not merely on a dealer in all of these articles.

2. *Same; want of license; on whom lies burden of proving.*—In a prosecution under this law, the State having proved the carrying on of a business which was unlawful without a license, it devolves on the defendants to show that they had taken out such license; and on their failure to do so, conviction is proper, though there is no affirmative proof on the part of the State that defendants had no license.

APPEAL from Mobile City Court.

Tried before Hon. O. J. SEMMES.

The indictment in this case charged that the appellants, Porter, and Jonathan and Millard Kirkbride, merchants, trading under the firm name and style of Ira W. Porter & Co., "carried on the business of dealers in pistols, bowie knives and dirk knives," at a certain place in the city of Mobile, without license and contrary to law, against the peace, &c.

The defendants pleaded not guilty, and a trial was had on an agreed statement of facts as follows: "Defendants are wholesale hardware merchants, carrying on business in the city and county of Mobile, at the place described in the indictment, and have kept on sale, within a year preceding the finding of the indictment, as one of the articles comprising their general stock of merchandise, a few pistols, and sold them within that time to their county customers, in connection with sales of general merchandise in their business, but have not kept for sale, or dealt in or sold, at any time, any bowie knives or dirk knives." This was all the

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evidence. On these facts the court charged the jury to find the defendants guilty, and "to return a verdict assessing the fine at one hundred and fifty dollars." The defendants excepted to this charge, and now assign it for error.

OVERALL & BESTOR, for appellants.—The language of the statute is, "for dealers in pistols, bowie knives and dirk knives," and it is for carrying on the business of selling *all three* of these articles that the license is required. Throughout the revenue law, the legislature used the word *or* and the word *and* with discrimination, and wherever a license is exacted of any one of several classes, or for dealing in certain things alone and not in connection with others, the word *or* is used. There is no room in this case for holding that *and* meant *or*.

Revenue statutes must be construed most favorably to the citizen.—10 Wendell, 186; 8 Georgia, 30; 1 Dev. & Battle, 218. Penal statutes must be strictly construed.—29 Ala. 81; 20 Ohio, 7; 8 Pickering, 370. This offense is not a common law offense. The statute creates its constituents and specially defines them. To uphold a conviction, the offense must be charged, in substance, in the language of the statutes, and the things forbidden by the statute, must be proved; not a part only of the things or acts necessary to constitute the offense.—44 Ala. 416. The agreed statement of facts says nothing about the taking out of a license. Could the court presume, in the absence of proof, that the defendants had no license? Under the indictment, it was incumbent on the State to show the want of license. This was affirmative matter to be shown by the State.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The court charged the law correctly.—See paragraph 15 of § 494 of Code of 1876. There was no conflict in the evidence, which was clear and without dispute, and warranted the conviction.

BRICKELL, C. J.—It is true that it is often said, penal laws, and revenue laws, must be strictly construed; but the rule, rightly understood, does not compel an adherence to the mere letter, or to the strict grammatical construction of sentences, defeating the plain legislative intention. What may be the grammatical construction of the clause of the revenue law under which the indictment is found, we do not propose to discuss. Verbal and grammatical criticisms, afford but little aid in the construction of statutes, or of any written instrument; and their application generally would

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defeat, rather than accomplish the legislative intention, or that of parties. The clause reads, "for dealers in pistols, bowie-knives and dirk-knives, whether the principal stock in trade or not, fifty dollars." It is a subdivision of § 494 of the Code of 1876, defining occupations, or pursuits, on which a tax is imposed, and for engaging in, or carrying on which a license is required. Throughout the whole section, it is clear, the intention of the legislature was to subject single particular occupations or pursuits, and not a combination of them, to a tax, and to a license. Generally, the intention is expressed by the use of the disjunctive *or*, as in the sixteenth subdivision, which reads, "for peddlers of medicines, or other articles of like character;" and as in the nineteenth subdivision, "for each exhibition of a menagerie or museum." When the subdivision now under consideration is read in connection with the whole section, it is impossible to resist the conclusion that the purpose was to impose a tax on each dealer in pistols, or in bowie-knives or in dirk-knives, and not only on a dealer in all of them.

2. The general rule is, that it is sufficient to prove so much of an indictment as shows that the defendant has committed a substantive offense therein specified.—*State v. Murphy*, 6 Ala. 846; *Mooney v. State*, 8 Ala. 328; *McElhaney v. State*, 24 Ala. 71. The agreed state of facts, admitting that the appellants had dealt in pistols, the burthen of proving that they had license was cast on them, and failing to make the proof, the charge given by the City Court was correct. The judgment is affirmed.

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Action to recover Damages on Injunction Bond.

1. *Damages; what not recoverable on injunction bond.*—Attorney's fees in procuring the dissolution of an injunction, and in resisting a motion to reinstate, are recoverable as part of the damages on an injunction bond, conditioned according to § 3430 of the Revised Code, but the fees paid for the after defense of the cause are not; and the rule is not different, because the bill sought the cancellation of a mortgage, and a perpetual injunction against a sale of property under it.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

The appellant, Henry Robertson, brought suit in the Cir-
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cuit Court against appellees, Richard Robertson and others, upon an injunction-bond executed on suing out a writ of injunction on behalf of defendant Richard against the plaintiff, which was dissolved upon the answer of the latter. By the condition of the bond, the obligors bound themselves to pay all such damages as should be sustained "by the suing out of said injunction, if the same is dissolved."

Upon the trial, appellant, plaintiff below, was allowed to recover, as a part of the damages sustained, the fees due to his attorneys for their services in the cause, to the time when the injunction was dissolved, and in opposition to a motion afterwards made to reinstate the injunction, which was defeated. But the fees due to them, for their subsequent services, in defending the suit to its termination in favor of their client, were not allowed. And the refusal to allow these fees as a part of the damages "sustained by the suing out of said injunction," is assigned as error.

PETTUS & DAWSON, for appellant.—The object of the bill, on which the bond was given, was for an *injunction*; a perpetual injunction was sought. Although the court dissolved the temporary injunction, the order was interlocutory merely, subject to be set aside, and the injunction could have been restored by an interlocutory order. So it is insisted, though the injunction was temporarily dissolved, it was necessary for the defendant in that suit to have the services of counsel after the injunction was dissolved, to prevent its being made perpetual. The prosecution and trial of the cause, after the injunction was dissolved, was, in substance, a continued motion to set aside the order dissolving the injunction and to make it perpetual. The authorities in other States are conflicting, but in this State the authorities are uniform, and sustain the right of compensation in such cases, for defending the *attachment suit*, the *detinue suit* or *injunction suit*.—21 Ala. 491; 43 Ala. 634; 24 Ala. 406; 35 Ala. 97; 19 Ala. 344; *Holmes v. Weaver*, 52 Ala.

JOHNSTON & NELSON, and JOHN WHITE, *contra*.—The only damages recoverable on the bond are such as arise from the operation of the injunction, and not such as are occasioned by the suit, independent of the injunction.—14 B. Monroe, 497. The recovery is limited to damages accruing between the suing out of the injunction and its dissolution.—*Waller v. Dilley*, 7 Ind. 237. Counsel's fees in procuring the dissolution, but not those for defending the entire case, are alone recoverable.—23 Ohio Stat. 264; *Longworthy v. McKelvey*, 25 Iowa, 341. The detinue bond is conditioned, if the plaintiff

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"is cast in the suit," and that in the attachment, to "prosecute to effect." But the injunction bond is not conditioned to pay damages caused by the suit. The injunction may be ancillary merely, and is not the commencement of the suit, which may continue after it is dissolved.

MANNING, J. (after stating facts as above).—In the absence of any statutory provision on the subject, the defendant in a civil suit has no recourse against the plaintiff, for the counsel and attorney's fees which he has been obliged to pay for his defense against the same, however groundless or causeless the suit may have been. In those cases, therefore, in which a party suing, instead of relying on the usual process of the court, requires for the protection of his supposed rights or interests, process of an extraordinary character,—and which he will be allowed to obtain only upon executing bond with security to pay all damages his adversary may thereby sustain,—the extent of the liability is to be ascertained by reference to the act, or the condition of the bond.

If the action be *detinue*, and the property in question is to be taken from the defendant by the sheriff, the bond to be given by the plaintiff provides that if he "fail in the suit, he will pay the defendant all such costs and damages as he may sustain *by the wrongful complaint*."—Code of 1876, §2942 (2593). This, of course, makes the liability extend to all the reasonable fees the defendant must pay for the defense of the suit. Besides, the extraordinary process in this action, under which the property in controversy was seized, and is held from the free use and disposition of the defendant, is not dissolved or vacated, until the controversy is terminated in his favor. Hence, it is properly held that he may recover as damages, all the reasonable attorney's fees he is obliged to pay for his defense to the end.

The same is true in respect to an action commenced by a writ of attachment. As the statute provides that "the defendant must not deny or put in issue, the cause for which the attachment issued,"—§ 3317 (2993),—the attachment writ, ordinarily, continues in force until the termination of the suit in favor of defendant; and he is entitled to all the expense he is reasonably put to in defending the action to its conclusion.

But a suit in chancery is not instituted by a writ of injunction—although such a writ may accompany the subpoena or summons, or be issued at any time after the filing of the bill. It is a collateral process only. A motion to dissolve it may be made at any time, and is usually made, often successfully, soon after the writ is obtained. After the dissolution of the

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injunction, the suit proceeds precisely as if there had never been any injunction in the cause, and wholly without effect from it. The cause was instituted by process independent of that writ, and continues to exist after it is vacated. The expense of services rendered afterwards, in defense of the suit, is not therefore properly damages sustained by the suing out of that writ; and numerous authorities hold that the attorney's fees for such subsequent services are not recoverable under the terms of an injunction bond.

The argument that because the original suit in chancery brought by defendant Richard, against appellant, prayed cancellation of a mortgage executed by the former, and that appellant be perpetually enjoined from selling the mortgaged property—therefore, the suit was a continual effort to reinstate the injunction and must be defended as such—is more ingenious than sound. A writ of injunction sued out before and in anticipation of a decree upon the merits, is as different from a perpetual injunction awarded after or by such a decree, as a writ of attachment is different from a writ of execution, or as judgment is from mesne process.

The precise question has not heretofore been presented for adjudication in this court. It has been decided that attorney's fees for services rendered in defense of injunction suits, were recoverable as damages under the injunction bond—as certainly they may be; but we find no case in which this court has held that fees for services rendered in such a suit after the injunction was vacated, and not in reference to, or caused by the injunction, could be recovered as damages produced by it. The sureties to the bond are entitled to stand upon its terms; and these terms are not to be extended by implication to increase their liability.

Let the judgment of the Circuit Court be affirmed.

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Application for Mandamus.

1. *Solicitor's fee for conviction for selling lottery ticket; what law governs.*—On indictment under § 4445 of the Code, in the form prescribed "for setting up or being concerned in a lottery," &c., a conviction may be had for the illegal sale of a lottery ticket on behalf of the manager, and the solicitor's fee may be taxed under that section; but where departing from the Code form, the indictment, or count remaining after a *nolle pro.*, purveys the language of a subsequent statute (now § 4446 of Code) making it a specific offense "to

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act for, or represent any other person in disposing of" a lottery ticket, it is an election to proceed under the latter statute, and on conviction, the solicitor's fee must be taxed under it, though both offenses are punished alike.

This was an application by John R. Tompkins, solicitor of the 6th Judicial Circuit, for a *mandamus* to be directed to the judge of the City Court of Mobile (Hon. O. J. SEMMES) to compel him to vacate and annul a certain order, retaxing the costs in the case of *The State v. Eneas Loughry*. The opinion states all the facts material to the application.

JOHN R. TOMPKINS, *pro se*.—The second count was a good count under § 4445 of the Code. It charged facts which authorized a conviction for that offense on indictment under it.—*Solomon v. The State*, 27 Ala. 26. The form in which that count was drawn, does not necessarily show that it was framed under § 4446 of the Code. So the substance of that statute is followed in all essential particulars, it is immaterial whether the form in the Code is followed. The offenses, in both sections, are punished alike.

BRICKELL, C. J.—The Code of 1852, § 3254, provided that "any person setting up, or concerned in setting up or carrying on any lottery, without the legislative authority of this State, must, on conviction, be fined not less than one hundred, or more than two thousand dollars." A form of indictment was prescribed, simply charging in the alternative as was authorized, when an offense could be committed by different means, "that the defendant set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State," &c. In *Solomon v. State*, 27 Ala. 26, it was held that a sale in this State of a ticket in a lottery to be drawn in a foreign country, or in a sister State, for or on behalf of an agent, or a conductor, or manager of such lottery, was a violation of the statute for which a conviction could be had under the form of indictment prescribed. The statute was re-enacted with this construction introduced into it, by the Penal Code of 1866, and became § 3616 of the Revised Code of 1867, and the same form of indictment was preserved. The Code of 1876, (§ 4445), contains the statute and the same form of indictment. In 1876 the Legislature enacted a statute against selling lottery tickets, or gift enterprise tickets, which, with other things, punishes the person "who shall act for or represent any other person in selling or disposing of any such ticket," as the former statute punished the setting up or being concerned in setting up a lottery.—Code of 1876, § 4446. The form of indictment under this latter statute is not prescribed.

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An indictment was found in the City Court of Mobile against Eneas Loughry, which contained three counts. The first is in the statutory form, charging him with setting up, or being concerned in setting up or carrying on a lottery. The second, charging him with selling or disposing of a lottery ticket. The third, charging him with acting for or representing another person in selling or disposing of a lottery ticket. A *nol. pros.* was entered as to the first and second counts, and the defendant pleading guilty as to the third count, on which there was a conviction, a fine of one hundred dollars assessed by the jury, and a judgment for fine and costs. The clerk taxed a fee of one hundred and fifty dollars for the solicitor, the fee allowed for a conviction under § 4445 of the Code. On a motion for a retaxation of costs, the court ordered that a fee of seven dollars and a half only be taxed for the solicitor, holding the conviction was not under § 4445 but under § 4446.

It is not necessary to inquire whether the third count of the indictment, though in the exact words of the last clause of § 4446 of the Code, does not embrace an offense, which fell within and was punishable under § 4445. This may be conceded, and it may be conceded that § 4445 and § 4446, covering the same ground, not in any of their provisions inconsistent, may well subsist together, the latter not repealing the former enactment. But when the State departed from the form of indictment prescribed for violations of the former enactment, and framed an indictment for a specific offense denounced in the later statute, by the form of indictment excluding evidence which would have been admissible under the statutory form, it was an election to proceed on the later, and not on the former statute. It is not unusual in practice, when the later statutes do not repeal former, for the prosecutor to elect to proceed under the one rather than under the other.—Bishop on Stat. Crimes, § 164. The prosecuting officer having elected to proceed for a conviction on a count manifestly framed under § 4446, and not under § 4445, was not entitled to the fee for a conviction under the latter section. Statutes allowing costs are penal, and must be construed strictly. No fee can be taken, unless it is expressly provided by law.—Code of 1876, § 5017; *Dent & Magruder v. State*, 42 Ala. 514. There may be no reason for the disproportion in the fee of the solicitor, on convictions had under these sections. That is not matter for the consideration of courts.

The application for a mandamus is denied at the costs of the petitioner.

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Indictment for Murder.

1. *Dying declarations ; admissibility of.*—Deceased was cut, about six o'clock in the evening, with a knife, in the lower portion of the left side, below the ribs, so that about an inch and a half of his intestines protruded, and died on the evening of the next day. Shortly after the wound was received, a physician dressed it, without expressing any opinion as to its character, and about this time deceased stated to persons in his room, that "he was going to die;" that "he would die in fifteen minutes." One of these persons tried to cheer him up, but it seemed to have no effect; and another witness afterwards told deceased he would get well, but deceased "insisted all the time he would die." He made statements about the cutting and as to who did it, shortly after the wound was dressed, to the persons then present, and after expressing this opinion of his condition. *Held:*

The declarations were rightly admitted as dying declarations.

2. *Same ; province of jury as to.*—To justify the admission of dying declarations, they must be made under a conviction of impending death, and must be confined to facts and circumstances immediately connected with the mortal injury. The court alone determines their admissibility ; their credibility and sufficiency being matters for the jury.

3. *Malice or motive ; how proved.*—Previous malice or motive to take the life of deceased, may in general be proved against one charged with the murder ; but it must be proved as a fact, and not as hearsay. It is not permissible to show that deceased, prior to the killing, had a conversation with a witness about a particular robbery, during which he spoke of the prisoner.

4. *Shackling prisoner on trial ; rule as to.*—It requires an extreme case to justify shackles or manacles on a prisoner undergoing trial ; but whether or not this is necessary, must be left to the enlightened and conscientious discretion of the lower court, in view of all the circumstances of the particular case; and the exercise of that discretion can not be reviewed on appeal.—(BRICKELL, C. J., dissenting on this point.)

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

Dan Faire *alias* Dan Farrell, was convicted of the murder of Peter Cornell, and sentenced to be hanged.

On the trial the State introduced one Neil, who testified that hearing Cornell had been cut, he went to his room and found deceased in bed. Witness then went to the guard-house and reported the cutting, and returned about ten o'clock that night, when either the witness or officer Dupree, who was then present, asked Cornell how he felt. "Deceased replied that he was going to die ; that he would die in ten or fifteen minutes. One of us then asked, who it was that cut him. Deceased said, as he was coming towards the mill along the sidewalk, he heard some one following him, who shortly afterwards called him. He stopped and turned

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around, and that as he did so, the person came up and he (deceased) asked what he wanted, when the person stuck a knife into him, saying, take that, you d—n son of a bitch. At this time he recognized the person as Dan Faïre. The deceased then gave witness a description of the man, who he said had cut him, and said that officer Pendergrast would know the man who stabbed him on account of the Walsh robbery." On motion of the defendant the court excluded that portion of this testimony, to the effect that the cutting was done about the Walsh robbery. The witness also stated that Cornell seemed to be impressed with the belief that he would die from the wound.

Deceased was cut about six o'clock in the evening. The wound was a smooth cut, about one and three quarters of an inch in width, on the lower portion of the side, below the ribs, and before it was dressed, his intestines hung out about an inch and a half.

Officer Pendergrast was then introduced, and testified that he knew the prisoner, and had known him some time. He was then asked by the solicitor: "Did you have any conversation with the deceased, prior to the alleged killing, about the Walsh robbery? The defendant objected, but his objection was overruled, and the court told the witness to answer "yes" or "no," and he answered "yes," and defendant excepted. The solicitor then asked, who the conversation was about. The defendant objected, but the court overruled the objection, telling the witness not to state the conversation, but only to give the name of the person, and the defendant excepted. The witness answered: Dan Faïre. Officer Dupree, who was in the room when deceased was talking to Neil, testified substantially to the same declarations as Neil did, with the exception that this witness said deceased called the name Dan *Farrell*, and not Dan Faïre. He further testified that he heard deceased say he was going to die from the wound. "Deceased was much excited and frightened, at the time he made the statement, and witness tried to cheer him up, by telling him that he was not going to die, as he (witness) had once seen a man cut much worse than he was, who got well; but witness did not think his words had any effect in changing deceased's opinion as to his condition."

Another witness stated, that when Neil and Dupree first came the wound had not been dressed, but on their return, between ten and eleven o'clock, it had been dressed by the doctor, who expressed no opinion whether the wound was fatal or not. This witness testified to the same declarations by deceased, as Neil had previously testified; except that

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the witness stated deceased said Dan *Farris* cut him. "Deceased was a Welshman, and always pronounced his words with a rolling R." Witness remained with deceased until a late hour that night, and heard him say he would die from the wound; witness tried to cheer deceased, but it seemed to have no effect, as deceased insisted all the time that he would die." It seems that deceased was employed in some oil mills, and when this witness, who was connected with them, was about to leave, deceased said "I will not get up steam for you in the morning." Deceased died about three o'clock, on the evening after he was cut.

"This being all the evidence as to the dying declarations of the deceased, and there being no direct evidence of the cutting, defendant moved to exclude them from the consideration of the jury," but the motion was overruled, and the "declarations allowed to remain before the jury," and defendant excepted. "The physician who dressed the wound of deceased, though a resident of Mobile, was not called as a witness by either side. No one but the deceased and the party alleged to have done the cutting were present or saw the same, which occurred on a cloudy night in a dark portion of the city of Mobile, a street lamp being on the opposite side of the street, about sixty yards distant."

The defendant requested the following charges in writing, and separately excepted to the refusal of the court to give them :

"1. The court charges the jury that dying declarations are admissible from necessity only; and because made in extremity, and when the party firmly believes that death is impending, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; and unless they believe from the evidence, that such were the circumstances under which Cornell's dying declarations were made, they ought to give them no weight."

"2. The jury ought not to give the alleged dying declarations of deceased any weight, whatever, unless they believe from the evidence that deceased understood and realized he was under the same solemn duty to state all that he knew, which would amount to a defense for the prisoner, as he would be if a witness, under such oath. Declarations are received, because they are supposed to be made, while the dying man is under a solemn sense of his duty to state the truth, the whole truth, and nothing but the truth, in reference to the accused's guilt or innocence of matters of which the declarant speaks; and if the jury are not satisfied from the evidence, that the declarant was in this state of mind

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when he made the declarations, they ought to give the prisoner the benefit of the doubt, and reject the declarations entirely."

"During the trial and after the plea of not guilty, and after several witnesses for the prosecution had given in their testimony, prisoner's counsel discovered, for the first time, that defendant, who sat in full view of the jury during the whole trial, was shackled with leg irons—that is, two clasps, one on each ankle, connected by an ordinary iron chain, about eighteen inches long, and about an inch and a quarter in diameter. When defendant pleaded and during the first day of the trial, he was unshackled, but the shackles were on him when the trial commenced on the second day, and remained on him the rest of the trial. During the time the prisoner was in shackles, several witnesses were examined, the case argued to the jury, and they charged by the court. As soon as the prisoner's counsel noticed the shackles, he called the attention of the court to the fact, that defendant was being subjected to a trial in irons, whereupon the court replied that it was done by order of the court on representations made by the sheriff. Defendant's counsel then made a motion to have the irons removed, whereupon the court ordered the sheriff to be sworn as to the cause of the shackling; whereupon defendant, by his counsel, stated that he did not want this done, as he did not know what the statements of the sheriff would be, and thereon defendant withdrew the motion, but asked the court to note what had taken place relative to the prisoner's being tried in irons, and allow an exception thereto, which was granted by the court.

"The representations made by the sheriff, and which were the cause of the court ordering the irons to be kept on the defendant during his trial, were made to the court in open court, but not under oath, and inaudibly to any save the court, and not in a voice to be heard either by the jury, the defendant, or his counsel; and were in substance that the prisoner stated to the sheriff, who had him in charge, that he would rather die than be hung or sent to the penitentiary, and if the jury found him guilty, he would not come out of the court-house alive, as he would escape or the officer would have to shoot him. The sheriff further stated, that from the character of the man, and his conduct in jail, he entertained serious apprehensions that the prisoner would attempt to escape, and create a scene in the court room, if not secured. The court told the sheriff to take the necessary precaution to prevent his escape, but not to place the irons on his hands, and make it as little apparent as possible, and not in the presence of the jury, and this was done. During

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the trial, from its commencement to the end, the prisoner made no attempt to escape, but remained quietly in his seat. Defendant's counsel knew nothing of said threats, nor did he or the defendant know, until after the trial was ended, what the representations to the court had been. And defendant objected and excepted to each and every, and all rulings, decisions, and refusal to charge, and to the refusal of the court to have the shackles removed from his ankles," &c.

The admission of the dying declarations; the refusal to exclude the statements about the Walsh robbery; the refusal to give the charges requested, and the rulings and act of the court in subjecting the prisoner to trial in irons, are each assigned as error.

SAFFOLD BERNEY, for appellant.—The court should have rejected the dying declarations. They were but the unsworn, unguarded statements of a frightened and excited man, who was, at the time he made them, being constantly cheered with hopes of recovery. It is common for persons, who are seriously wounded, to say they are "dead," or "will die"—just as the deceased said he would "die in fifteen minutes." It was not satisfactorily shown, that he was under a sense of impending dissolution, and had utterly despaired of recovery.

2. Besides this, the declarations ought to have been excluded for another reason. These declarations were the only direct evidence connecting the prisoner with the cutting. The offense was committed on a cloudy night, in a dark part of the city, and the declarations, as proved, conflicted as to the person who did the cutting. One witness says deceased said it was Dan *Faire*; another that it was *Farris*, and still another, that it was *Farrell*. Under these circumstances the declarations, even if properly admitted, were too uncertain, vague and unsatisfactory to authorize the jury to find beyond a reasonable doubt that the prisoner did the cutting. Admitting all the evidence to be true, it should be excluded on motion, if it will not authorize a verdict.

3. The evidence as to conversations about the "Walsh robbery," was, at most, mere hearsay. It was not shown to have any connection with the cutting, and its only effect was to prejudice the jury.

4. The court erred in subjecting the prisoner to a trial in irons. It was not shown to the court that there was *evident* necessity for ironing the prisoner during the trial.—Blackstone's Com. B iv, ch. xxx. That author uses the words, "*evident danger of escape*." The representations of the offi-

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cer, which caused the order, were unofficial, and not sworn to. Trying the prisoner in irons, prejudiced his case before the jury. It was equivalent to a declaration by the officers, that the prisoner was such a bad and desperate man, they were afraid to trust to other methods to keep him in custody. The prisoner had no opportunity to deny or disprove the alleged threats and conduct imputed to him. The precedent sought to be established in this case, is a most dangerous one. All that a sheriff or officer, who has ill-will to the prisoner, has to do, is to make an unsworn statement to the judge that the prisoner is dangerous or made some loose threat, and an order is made to iron him during trial. In this way, the most harmless and inoffensive man can be manacled, without a hearing, and without any remedy.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The charges refused sought, in effect, to have the jury review the decision of the court, that the declarations were admissible. The other charge, to say the least of it, was abstract. Both were properly refused.—*Washington & Lewis v. The State*, 53 Ala. 29; *Eiland v. The State*, 52 Ala. 322. "The fact that shackles were kept on the prisoner, to prevent violence or an attempt to escape during the trial, furnishes no ground for reversal of the sentence."

STONE, J.—The witness, Pendergrast, was permitted to testify, against the objection of defendant, that in a conversation between witness and deceased, had prior to the alleged killing, the deceased spoke of the prisoner, Faire, during a conversation which related to the Walsh robbery. What was said was not permitted to be shown; but the evident tendency of the testimony, and the order in which it was stated, was to connect the prisoner's name with the 'Walsh robbery.' This was clearly irrelevant. It was but a repetition of unsworn hearsay, and we can not perceive its materiality, if proved as a fact, offered alone as it was, without any surroundings, or connecting circumstances. Connecting his name with a robbery, could not fail to stimulate or engender a prejudice against him; and there is nothing shown to connect it with the homicide, or with a motive for its commission. Previous malice towards the deceased, or a motive for taking his life, may, as a rule, be proved against any one charged with murder; but it must be proved as a fact, not as hearsay.—*Campbell v. The State*, 23 Ala. 44; *Ingram v. The State*, 39 Ala. 247; *Balaam v. The State*, 17 Ala. 451; *Magee v. The State*, 32 Ala. 575.

The question of the admissibility of dying declarations, is for the court's determination. The jury passes upon their

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credibility and sufficiency, but not upon their admissibility. To justify their admission, they must be made under a conviction of impending death, and, in scope, must be confined to the facts and circumstances immediately connected with the mortal injury.—1 Brick. Dig. 511, 512, §§ 891, 892, 893, 894. The rulings of the city court on this question are free from error.—*Edgar v. The State*, 43 Ala. 45.

It should be an extreme case to justify shackles or manacles on a prisoner undergoing trial. Sir Wm. Blackstone, 4th Com. 322, says: "The prisoner must be brought to the bar without irons, or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons." And, as we understand the principle we are discussing, all the authorities agree substantially with what is said by Sir William Blackstone. In Hale's Pleas of the Crown, vol. 2, p. 219, it is stated thus: "The prisoner, though under indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then they may be brought with irons." In Layer's case, the Lord Chief Justice said, "As to the chains you complain of, it must be left to those to whom the custody of you is committed by law, to take care that you may not make your escape; when you come to your trial, then your chains may be taken off."—16 Howell's St. Trials, 94. In Waite's case, 1 Leach, 33, the Court said, "The prisoner, at the time of his arraignment, desired that his irons might be taken off; but the court informed him that they had no authority for that purpose until the jury were charged to try him. He accordingly pleaded not guilty; and being put upon his trial, the court immediately ordered his fetters to be knocked off." Waite was indicted for grand larceny, in the theft of six East India bonds, of £100 each, the property of the bank of England. The principle is thus stated in 1 Bish. Cr. Proc. § 731: "The prisoner, on his arraignment, though under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons."

As we understand the foregoing authorities, from the learned Blackstone down, there is no absolute, unbending rule, that a prisoner on trial for crime shall, in no case, be fettered. Even in Harrington's case, 42 Cal. 165 (the only case brought to our notice, in which there was a reversal on this account), the language of the court forbids the construction that it would, under all circumstances, be error to proceed with the trial of a prisoner, without removing his

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shackles. The language of the court was, "To require a prisoner, during the progress of his trial before the court and jury, to appear and remain with chains and shackles upon his limbs, without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common law rule, and of the thirteenth section of our criminal practice act. In the present case, there is no pretense of necessity for the manacles and chains upon the defendants, during their trial, to secure their presence to answer the judgment." It was stated in the bill of exceptions that "no circumstances or facts were shown to the court why a different rule should be enforced in this cause than any other." The defendants were tried for the crime of robbery. It should be observed that under the California judicial system, an appeal lies to their Supreme Court from an order granting or refusing a new trial. We think some importance should be attached to the fact, that in that case the decision of the court that the prisoner was entitled to appear for trial "free from all manner of shackles or bonds," is qualified by the emphatic language, "unless there is danger of his escape." All these authorities concede, that there may be circumstances—danger of the prisoner's escape—which would justify placing fetters upon him.

This court has no right or power to entertain appeals from orders of the inferior courts, granting or refusing new trials, or granting or refusing continuances or changes of venue. These are confided to the sound discretion of the courts of primary jurisdiction. And, inasmuch as there are cases in which it is permissible to try prisoners with shackles on them, we confess ourselves unable to lay down any rule for the guidance of the primary courts, except to leave the question to their sound and enlightened discretion. Of course, no prisoner, while undergoing trial, should be exposed to the discomfort or mortification of any description of shackles or bonds, unless his conduct in prison, or other satisfactory evidence, create a reasonable belief that such restraint is necessary to prevent his escape; or, perhaps, to prevent a rescue, if surrounding circumstances give sufficient evidence of the danger. It is the duty of the sheriff to keep the prisoner in safe custody, that he may abide the judgment of the law; and his watchfulness, sanctioned and controlled by the court, will rarely err in the exercise of such power. As we have said before, we know not how to lay down a rule for the administration of an appellate jurisdiction over such precautionary measures.

In this case, the record informs us that the prisoner had made to the sheriff violent threats, in case he was convicted.

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He was indicted and to be tried for an alleged murder, committed without warning, and by assassination. The presiding judge and sheriff, each filling very responsible offices, and acting under a solemn official oath, could much better judge of the necessity of extraordinary restraint, than we possibly can. It is contended, however, that there should have been a public inquiry and ascertainment of this necessity, and that the prisoner should have been allowed to be present, and confront and controvert the evidence offered, if he desired. The prisoner's arms were free, but there were clasps on his ankles, connected by a chain 18 inches long, 1½ inches in diameter. This was discovered by prisoner's counsel while the trial was in progress, and he immediately called the attention of the court to it, and asked that they be removed. The court replied, it was done by order of the court, on representations made by the sheriff. To the motion of defendant that the shackles be removed, the court proposed to have the sheriff sworn as to the cause of the shackling, when the defendant, by his counsel, stated that he did not want that done, as he did not know what the statement of the sheriff might be; and defendant withdrew the motion, but asked the court to note what had taken place, relating to the prisoner being in irons, and allow an exception thereto, which was granted by the court. The prisoner was not in irons during the first day of the trial, but was shackled, as above shown, during the second day.

The bill of exceptions states that "the representations made by the sheriff, and which were the cause of the court ordering the irons to be kept on defendant during his trial, were made to the court in open court, but not under oath, and inaudibly to any save the court, and not in a voice to be heard either by the jury, the defendant, or his counsel; and were, in substance, that the prisoner stated to the sheriff, who had him in charge, that he would rather die than be hung or sent to the penitentiary; and if the jury found him guilty, he would not come out of the court house alive, but that he would escape, or the officer would have to shoot him. The sheriff further stated, that from the character of the man, and his conduct in jail, he entertained serious apprehensions that the prisoner would attempt to escape and create a scene in the court room, if not secured. The court told the sheriff to take the necessary precaution to prevent any attempted escape, but not to place the irons on his hands, and make it as little apparent as possible, and not in the presence of the jury; and this was done."

As we have said above, the judge and the sheriff were sworn officers; and we think it is not a violation of the usages

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of courts, nor of any right of the prisoner, for the court, in incidental matters, connected with the conduct of the business of the court, to act on the statement of its executive officer, without requiring of him an oath of the truth of his representations. And we think that to require a public disclosure and trial of the facts, as a preliminary to the placing of irons on prisoners undergoing trial, would be much more likely to create a prejudice against the prisoner than quietly to order the same, as was done in this case.

The practice of the Lord Chief Justice Holt, we think, should weigh nothing against these views. The remark imputed to him, as we understand it, was made in the trial of a cause which was marked by no facts or circumstances rendering it necessary that the prisoner should be shackled. The remark did honor to his head and heart, and was intended, as its language imports, to express more a rule of judicial propriety, than of municipal law. He was dealing with a custom, then become common and oppressive, and not with a case, whose circumstances showed the necessity of bands to prevent escape. To shackle prisoners without cause, is certainly a revolting practice. We do not think there ever has been an unbending rule of law, that no prisoner, under any circumstances, can be brought to trial in irons. True, it should rarely be done, and never, except in cases where the circumstances show real danger of escape, or, perhaps, of rescue. But we do not think that, under our system, this question can be raised as cause of reversal in this court.

For the error above pointed out, the judgment of the City Court is reversed, and the cause remanded. Let the prisoner remain in custody until discharged by due course of law.

BRICKELL, C. J.—I cannot assent to the proposition, that it is mere matter of discretion with a judge, whether the prisoner shall be brought to the bar, or tried in fetters. There may, possibly, be a necessity for fettering a prisoner, and if such necessity should be shown, it may be the duty of the court to order it. The action of the court is, in my judgment, revisable, and a judgment of conviction should be reversed, if it did not clearly appear that there was an immediate, pressing necessity for the order, which it is admitted should be made only in exceptional cases.

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Bill in Equity by Wife to enforce Resulting Trust in Lands purchased with Money of her Statutory Estate and conveyed to her Husband.

1. *Resulting trust; general doctrine concerning.*—The general doctrine is, that when the purchase-money of land is advanced by one person, while the title is taken in the name of another, a trust results, in the absence of an agreement to the contrary, in favor of the person who advanced the money; but to bring a case within the operation of this rule, the money must be paid at the time of the purchase.

2. *Same; as regards use of trust funds by trustee.*—When a trustee invests trust funds in the purchase of lands, and takes the title in his own name, or in that of a stranger, whether the payment is made at the time of the purchase or afterwards, the *cestui que trust* may claim the property so purchased, or any other specific property into which the trust funds can be traced; and can also assert a lien on it for reimbursement; and this right may be asserted not only against the trustee, but also against purchasers from him with notice, either actual or constructive.

3. *Same.*—This principle applies to a purchase by the husband, with moneys of the corpus of the wife's statutory estate, of lands the title to which he took in his own name; but the wife can not enforce her equity in such a case against a *bona fide* purchaser from her husband without notice, nor against a judgment creditor (Revised Code, §§ 1590-91) who had no notice prior to the levy.

APPEAL from the Chancery Court of Monroe.

Heard before Hon. CHARLES TURNER.

The original bill in this cause was filed on the 13th day of November, 1874, by the appellee, Tarnissa McMillan, by her next friend, against her husband and Preston & Stetson, to set up and enforce a resulting trust in her favor in certain lands her husband had purchased with moneys the corpus of her statutory estate, taking title in his own name, and to enjoin the sale of them on execution against her husband. It was afterwards amended by stating that the lands had been sold and conveyed by the sheriff to Preston & Stetson, and prayed that the sheriff's conveyance be annulled, and that Preston & Stetson be perpetually enjoined from interfering with the lands or claiming title under the sale and conveyance.

The case made by the bill and amendment, answers and testimony, may be thus stated:

Complainant, who was then a Miss Faulk, intermarried with her husband in Monroe county, in this State, in the year 1846. Her father died in the year 1852, leaving an

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estate, which was administered in the probate court of Monroe county. On the 14th day of June, 1855, complainant's husband receipted to the administrator of her father for \$649, as her distributive share of the estate, and she also received a negro slave from the administrator. The money was not actually paid over to complainant's husband, but retained by Roberts, the administrator, and placed to the credit of complainant's husband on a note he had given Roberts, as administrator of one Emmons, for the tract of land in controversy. The negro slave was traded off for others, one of whom was sold, and the remainder of the amount due for the lands, paid with the proceeds; but the exact date when this last payment was made is not shown. The whole amount thus paid was \$1,260, and Roberts executed to complainant's husband a deed to the lands on the 7th day of April, 1856, and complainant and her husband have ever since resided on them. This deed was duly recorded on the 22d day of April, 1856.

During the years 1870 and 1871, complainant's husband contracted an account with Parker & Wiggins for provisions, clothing, &c., and in settlement of the balance due gave them his note for \$323, on the 29th day of November, 1873. This note was transferred to Preston & Stetson in January, 1874, and they recovered judgment on it on the 22d day of April following. Execution was issued on this judgment on the 8th day of May, 1874, and placed in the hands of the sheriff of the county in which the lands were situated, and on the 13th day of October, 1874, returned "no property." An *alias* was issued, and received by the sheriff December 1st, 1874. The next day the execution was levied on the lands in controversy, and all of them, with the exception of 160 acres claimed as exempt, were sold on the 4th day of January, 1875, and bid in by one McCorvey for Preston & Stetson, to whom the sheriff executed a conveyance. It was not averred or shown that Preston & Stetson, or the person from whom they acquired the note, had any notice of complainant's equities prior to the levy of the execution. It does not appear when the subpoena was served upon Preston & Stetson. Their answer to the original bill was filed February 1st, 1875, and that to the amendment in May following. There was a decree *pro confesso* against complainant's husband. The answers denied notice of the wife's equity, and set up the long delay of complainant in asserting her equities in bar of relief, and averred that, upon the husband's ownership of the lands, the title and possession being in him, "as shown to the world, he obtained a credit of the debt on which the judgment was obtained, and complainant should not, after

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the lapse of eighteen years, be allowed to set up her claim, and thereby defeat the rights of creditors," and averred the rendition of the judgment and the issue of execution thereunder, before the filing of the bill.

The chancellor decreed the relief prayed, and hence this appeal.

S. J. CUMMING, for appellants.—To constitute a resulting trust, it is not sufficient that the land was paid for with one person's money, while another took the title. The money must be paid or advanced *at the time of the purchase*—3 Ala. 302; *Botsford v. Burr*, 2 Kent Ch. 405. The evidence does not show when the purchase was made, or whether it was then intended to pay for the land with Mrs. McMillan's money, or when those payments were made. A resulting trust was, therefore, not proved.

2. Appellants come within the influence of § 1591 of the Revised Code. They were creditors, and had a *lien* at least from the date of the sheriff's receipt of the execution, if not from the rendition of the judgment, and all of this was before any notice of the wife's equities. The case of *Robison v. Robison* (44 Ala. 227), can not be sustained on authority; besides, this case is unlike that. In that case, the money was advanced to the husband, with the express understanding that it was to be used in paying for the lands. Here no such agreement or intention is averred or shown.

J. W. POSEY, *contra*.—The husband was a trustee, and paid for the lands with trust money, and the law raises a resulting trust in favor of the wife.—*Robison v. Robison*, 44 Ala. 227; *Holley v. Flournoy*, 54 Ala. The appellants must be *bona fide purchasers*, and show themselves to be such, before they can defeat the wife's right. They have not done this. They had notice before the sale. They have nothing to do with the staleness of the demand, if they had notice of it.

STONE, J.—We think the testimony in the present record fully proves that the money and property with which the lands in controversy were purchased and paid for, were of the corpus of the statutory separate estate of Mrs. McMillan. Although she and her husband intermarried before 1848, her father, Faulk, died about 1852; and the money and slave, which were used in paying for the lands, came to her from his estate after his death. Her husband employed the money thus received, and the proceeds of one of her slaves sold, in paying for the lands, and took the title in his own name. He and she have lived together, on the lands, ever

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since the purchase; about twenty years, when this bill was filed. The object of the bill, is to prevent the sale of the land under an execution against her husband—to have a trust declared in her favor, and the title decreed to her.

When the bill was filed, the defendants, Preston & Stetson, had obtained a judgment in the Circuit Court of Monroe against McMillan, the husband, and execution issued thereon was in the hands of the sheriff, for levy and collection. The defense relies on this lien, and also on staleness, and the length of time elapsing between the origin of the trust, and the attempt to have it declared.

In *Goldsmith v. Stetson*, 30 Ala. 167, and in *Dent v. Slough*, 40 Ala. 518, the husband had mingled the money assets of his wife's statutory separate estate in his mercantile affairs; and the question was whether she could have a trust fastened on the mercantile effects, as a preferred creditor. It was ruled that she could come in only as a general creditor, without lien or priority. In each of these cases the property on which the trust was sought to be fastened, was personal goods; had been employed in merchandise which had been constantly changing by sales and reinvestments, and it was impossible to identify and segregate any particular articles or chattels, into which her money had entered and been converted.—See *Thompson's Appeal*, 22 Penn. St. 16.

In the present case, the money and effects of the wife's statutory separate estate were invested in lands, paying the entire purchase-money, and the title was taken in the name of the husband. Only a part—a little less than half—was paid at the time of the purchase. The residue was paid some two years afterwards, in discharge of the husband's debt for balance of purchase-money; soon after which time the title was made. This was eighteen years before the present bill was filed.

The general doctrine on the subject of resulting trusts is, that, in the absence of an agreement, express or implied, showing a contrary intention, when the consideration money is advanced by one, and the title taken in the name of another, a trust results in favor of the party who advances the money, and the land will be held by the grantee in trust for the person who so pays the consideration money.—2 St. Eq. Jurisprudence, § 1201, and authorities in note; *Boyd v. McLean*, 1 Johns. Ch. 582. But to bring a case within this rule, the money must be paid coterminously with the purchase.—See *Foster v. Trustees, &c.*, 3 Ala. 302; *Danforth v. Herbert*, 33 Ala. 497; *Cagle v. McCollum*, 27 Ala. 461; *Barnard v. Jewett*, 97 Mass. 87; *Nixon's Appeal*, 63 Penn. St. 279; *Botsford v. Burr*, 2 Johns. Ch. 405. And the consideration may

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be paid in labor or property.—*Clark v. Clark*, 43 Verm. 685; *White v. Sheldon*, 4 Nev. 280. And Chancellor Kent declares the rule to be, that where part of the purchase-money is so paid by a third person, contemporaneously with the purchase, a trust results *pro tanto*.—See *Bolsford v. Burr*, *supra*. See, also, *Garrett v. Garrett*, 1 Strob. Eq. 96; *Church v. Sterling*, 16 Conn. 388; *Ross v. Hegeman*, 2 Edw. Ch. 373; *Jackson v. Bateman*, 2 Wend. 570; *Reid v. Fich*, 11 Barb. 399; *Buffalo &c. R. R. Co. v. Lampson*, 47 Barb. 533; *Brothers v. Porter*, 6 B. Monroe, 433; *Lathrop v. Gilbert*, 2 Stockt. Ch. 344; *Johnson v. Dougherty*, 3 Green, N. J. 406; *Baker v. Vining*, 30 Maine, 121; *McLawn v. Brewer*, 51 Maine, 402; *Valle v. Bryan*, 19 Mo. 423; *Pierce v. Pierce*, 7 B. Monroe, 7.

But the question we have been considering, is one of simple resulting trust, where there is no other relation between the person by whom the money is paid, and the person in whose name the title is taken, than that which the circumstances of the transaction itself impose upon them—where there is no relation of confidence or trust between the parties, except that A advances the money, and B takes the title. In the case we have in hand, the purchase was made by, and the title taken in the name of the husband, while the purchase price was paid with money and property which were of the statutory separate estate of the wife, of which he was trustee.

The Code of Alabama, § 2705, declares that “all property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband.”—§ 2706. Property thus belonging to the wife, vests in the husband as her trustee, who has the right to manage and control the same.

§ 2707. The property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly by instrument of writing.

§ 2709. The proceeds of such sale is the separate estate of the wife, and may be reinvested in other property, which is also the separate estate of the wife.”

When the purchase is made, or the money paid with trust funds, such as the statutory separate estate of the wife, is the rule different? and if so, to what extent is it different? We have seen above that to constitute a resulting trust in ordinary form, the money must be paid at the time of the purchase; and if it be paid afterwards in extinguishment of a debt previously created, no trust results. But if the money thus paid be trust funds, what is the rule? The husband may reinvest the proceeds of the wife's property, sold by

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them, in other property; and such other property becomes "also the [statutory] separate estate of the wife." If he re-invest such proceeds, and take the title in his own name, has she any remedy, and if so, against whom?

In Perry on Trusts, § 836, it is said, "If the trustee invests the trust funds, or its proceeds, in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase as made with the trust property or its proceeds, although the trustee may have taken the title in his own name, or in the name of any other person with notice of the facts."

§ 837. "If a trustee purchases an estate partly with his own money and partly with trust money, it can not be predicated that any particular part of the estate was purchased with money of the *cestui que trust*, but he will have a lien on the whole estate for the amount of the trust fund that was misemployed."

§ 832. "If a trustee loans the trust funds in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee; and he can not separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands."

So, if a trustee misapply trust funds, and pay them out for a purpose not authorized by the trust, and the person to whom he pays them has knowledge that they are trust funds, this is a breach of trust in each, and the person receiving the fund under these circumstances, becomes a trustee, liable for the performance of all the trust duties which rested on the lawful trustee.—Perry on Trusts, §§ 810, 814, 835, 836, 840, 841. "Where the trust fund constitutes a part only of the purchase-money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested and interest."—Perry on Trusts, § 842. See, also, *Meth. Epis. Ch. v. Jaques*, 1 Johns. Ch. 450.

The case of *Day v. Roth*, 18 N. Y. 448, was the investment of trust funds in part purchase of real estate, the title to which was taken in a third person. Speaking of the agreement to invest, under which the money was received, the court said: "It would impress the fund itself with the characteristics of a trust, and the impression would go with it into his hands, or into his estate. The plaintiff would have a right to follow and claim it so long as she could trace its identity into whatsoever hands it might be transferred, and to charge it upon any man's estate in which she might find it invested, unless the owner of the estate could claim

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that after such investment he purchased the estate in good faith, and acquired the legal title."

The case of *Turner v. Petigrew*, 6 Humph. 438, was the purchase of slaves by a guardian at administrator's sale, and afterwards, a payment of the debt with the ward's effects. The ward claimed the slaves. The court said: "The reception of his own debt by the guardian, as a portion of his ward's distribution, from the administrator, and this debt having been contracted for a purchase of their negroes, makes as strong a case against him, as if he had actually paid out the money of his wards. It, so far as their interests and rights are concerned, places them in the same position; and, inasmuch as it is the appropriation of the money that raises the equity, it can make no difference whether these appropriations be made at the time of the contract of purchase, or afterwards in payment thereof." The plaintiffs recovered the property.—See, also, *Barker v. Barker*, 14 Wis. 131; *Hammett's Appeal*, 72 Penn. St. 337; *Beck v. Ulrich*, 16 Penn. St. 499; *Seaman v. Cook*, 14 Ill. 501; *Stow v. Kimball*, 28 Ill. 93; *White v. Drew*, 42 Mo. 561; *Wallace v. Duffield*, 2 Serg. & R. 521; *Freeman v. Kelly*, Hoffm. Ch. 90; *Lee v. Fox*, 6 Dana, 171; *Pugh v. Pugh*, 9 Ind. 132; *Bancroft v. Causen*, 13 Allen, 50; *Williams v. Hollingsworth*, 1 Strob. 103; *Harrisburg Bank v. Tyler*, 3 Watts & Serg. 373; *Moffit v. McDonald*, 11 Humph. 457; *Oliver v. Pyatt*, 3 How. U. S. 333, 401; *Cuplinger v. Stokes*, Meigs, 175.

So, in *Tilford v. Torrey*, 53 Ala. 120, this court said, "It is a well established principle in courts of equity, that if a trustee invests the funds he holds in a fiduciary capacity, in the purchase of lands, taking the conveyance of title in his own name, the *cestui que trust* may, at his election, charge the trustee personally, or may follow the money into the land, and claim the purchase as having been made for him. The principle applies when a purchase is made by a husband, with the proceeds or accumulations of the wife's separate estate. If a part only of the purchase money is paid with trust funds, a resulting trust will be created to the extent of the payment; or the *cestui que trust* may charge the lands with the repayment to him of the sum so paid."—See, also, *Kavanaugh v. Thompson*, 16 Ala. 817; *Perry on Trusts*, § 127.

It follows, from what is said above, that there is a notable difference between the cases of simple resulting trusts, and investments by a trustee of trust funds in his own name. In the former case, the payment must be made at the time of the purchase, to confer an equity on him whose money is used, to have a trust declared in his favor, of the entire estate

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or a proportionate part of it, as he has paid the entire purchase-money, or only a part of it. After payments have no such effect, and confer no equitable rights in the land.

But when a trustee invests trust funds, or trust effects in property, and takes the title in his own name, or that of a stranger, no matter whether paid at the time of the purchase or afterwards, so long as such trust funds can be traced into specific property, the *cestui que trust* can claim the entire property, if entirely paid for with his funds; and can also assert a lien upon the property for reimbursement, to the extent his moneys were so misapplied.—See *Tilford v. Torrey*, *supra*. This right, however, exists only against the trustee, against persons who stand only in his right, and against purchasers from him with notice, actual or constructive. The right of the *cestui que trust* is only an equity; and *bona fide* purchasers from him who has the legal title, without notice of the violated trust, and without knowledge of some fact or circumstance sufficient to put them on inquiry, will acquire a good title. Only those who have notice of the breach of trust, and acquire the trust funds or their proceeds, notwithstanding such knowledge, forfeit their plea of *bona fide* purchase, and are charged *in invitum* with the burden of the trust. This scarcely can be called a resulting trust.

That what we have said may not be misunderstood, we feel it our duty to say that the rules laid down above do not apply, when a husband, as trustee, invests all or any part of the corpus or product of his wife's statutory separate estate, and takes title in her name. The statute authorizes him to do that.—Code of Alabama, § 2709; *Marks v. Cowles*, 53 Ala.; *Pylant v. Reeves*, 53 Ala.; *Sterrett v. Coleman*, December term, 1876.

It results from the principles above declared, that Mrs. McMillan has made out her claim to relief, if there be nothing else in this record to deprive her of such right.

The very long delay in asserting her claim has been urged in defense. Permitting title to remain in her husband, was certainly calculated to give him credit; and to allow her now to intercept the process of the law, and thus prevent the enforcement of his debts, would work a great oppression to his creditors. The title being in him, the possession would be referred to his title; and the public was justified in treating him as the owner.—1 Brick. Dig. 806, §§ 39, 40. See, as to staleness, *Hutton v. Landman*, 28 Ala. 127; *Garrett v. Garrett*, 29 Ala. 439.

As we have stated above, Preston & Stetson recovered a judgment against W. H. McMillan, the husband, April 22d, 1874. Execution upon this judgment went into the hands of

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the sheriff of Monroe county—the county in which the lands lie—May 8th, 1874, and was returned by him October 13th, 1874. An alias execution on said judgment was received in office by said sheriff December 1st, 1874, was levied on the lands in controversy December 2d, 1874—and on the 4th day of January, 1875, said lands, less a homestead of 160 acres claimed by her husband, were sold and conveyed by the sheriff to Preston & Stetson. The bill in this cause was filed November 13th, 1874. The record does not show when summons was issued or served, but the answer of defendants was filed February 1st, 1875. There is no averment or proof that Preston & Stetson, or those from whom they acquired the note which is the foundation of the judgment, had notice of Mrs. McMillan's equity, other than what appears above as to the filing and answer of the bill.

The case of *Daniel v. Sorrells*, 9 Ala. 436, was as follows: Title to the lands had been in John Sorrells, but in January, 1842, he conveyed by deed to Smith, under whose title defense was made. This deed was placed in the proper office for registration August 25th, 1842. Plaintiff made title under a judgment rendered against John Sorrells July 25th, 1842, execution thereon August 5th—and sale by the sheriff, and purchase by him, under an alias execution properly issued, made February, 1843. Judgments were then liens on lands, from the date of their rendering. This court said, "The effect of the judgment was to give to the plaintiff therein a lien upon the real estate of the defendant, of which he was the legal proprietor, or of which he had been, and has not so disposed of the property against creditors, as to free it from liability against debts. * * Whether the purchaser from the sheriff was informed of the existence of the unregistered deed, after the rendition of the judgment, is not at all material. For we have seen that he may invoke the lien of the judgment creditor, to perfect his title."—*Jordan v. Mead*, 12 Ala. 247, is to the same effect. See, also, *Governor v. Davis*, 20 Ala. 366; *De Vendell v. Hamilton*, 27 Ala. 156. The principle of these authorities is, that the right of the purchaser dates from the time the lien accrued, under which he acquired title; and that want of notice in the judgment creditor, at the time his lien accrued, is, by relation, want of notice to the purchaser under such lien. These decisions overturn the older case of *Avent v. Read*, 2 Stew. 488.

But this principle, according to the general doctrine on the subject, as declared in most of the States, is confined to that class of counter claims which, under the registration laws, are required to be recorded, as a means of giving notice of their existence. Hence, it is said to have no application to equita-

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ble rights which are not required to be recorded. And judgment creditors are held not to be purchasers, within the principle above set forth, as against trusts implied by law. Such judgment creditors, and purchasers at execution sale, take, as against such trusts, only such title as belonged to the debtor, with all encumbrances thereon.—See 2 Sto. Eq. Ju. § 1503 *b*, and note 2, as expressing the general doctrine on the subject. See, also, 2 Lead. Ca. in Eq. pt. 1, pages 89 *et seq.*, 4th Amer. ed., for a very full collation of authorities, and discussion of this principle; *Brace v. Duchess of Kingston*, 2 P. Wms. 491; *Lappington v. Oeschli*, 49 Mo. 244.

We have stated the general rule, which discriminates between those evidences of title to land which are required to be recorded, and trusts which arise by implication of law. In the Code of 1852, §§ 1320–1, Rev. Code, §§ 1590–1, Code of 1876, §§ 2199–2200, are the following provisions:

“No trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney, lawfully authorized thereto in writing.

“No such trusts, whether implied by law, or created or declared by the parties, can defeat the title of creditors, or purchasers for a valuable consideration, without notice.”

The foregoing provisions are found in Article 5, Chapter 1, Title 1, Part 2, of our Code, which treats of the construction of conveyances and trusts, and modifies many of the common law rules in regard to real property. Many of its provisions were borrowed from the New York Revised Statutes, as we have frequently had occasion to state.—See Rev. Stat. of New York of 1829, vol. 1, pages 721 to 739; Part 2, Chap 1, Title 2, in four articles. Section 54, Article 2, is the only one bearing on the question in hand. Its language is, “No implied or resulting trust shall be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration, and without notice of such trust.” It will be observed that this section provides for purchasers only, and makes no mention of creditors. The construction of their statute rightly conformed to the general rule above declared. See *Sieman v. Schurck*, 29 N. Y. 598, 613, and earlier New York decisions cited. See, also, *Rodgers v. Bonner*, 45 N. Y. 379, 387.

In the case of *Sieman v. Schurck*, *supra*, the question was whether a judgment creditor came within the statute above copied. The court, after citing section 54, *supra*, said: “The defendants are not within this category for the following

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reasons: 1. The plaintiff's deed was on record before the purchase at the sheriff's sale. * * 3. William Austin and Schurck had actual knowledge before the sheriff's sale that Youngs did not hold the deed for his own benefit. 4. Mary Austin was not a purchaser for a valuable consideration from her brother. 5. Neither William Austin nor Mary Austin, if notified before the purchase by them, of facts affecting Youngs' title, can be protected upon the ground that they had no such knowledge at the time of the judgment. In this particular their purchase takes effect from the time of the actual sale, and does not reach back by relation to the date of the judgment."

Unlike the New York statute, our's provides equally for creditors and purchasers. All will admit that *bona fide* purchasers without notice would be protected against latent equities and implied trusts. The statute, copied above, places creditors on equally elevated ground. Creditors, under this statute, are judgment creditors, having a lien.—*Thomason v. Scales*, 12 Ala. 309; *Daniel v. Sorrells*, 9 Ala. 439.

It is contended that section 2200 of the Code of 1876, protects only the *title* against latent equities; and that inasmuch as creditors, as such, have no title to the property of their debtors, this clause does not reach or include them, until they have levied and sold under their lien, and thereby acquired title. The answer to this is, first, that this construction leaves no field of operation whatever to the word creditors; for, after sale, the person claiming under it, does so as purchaser, and not as creditor. The one claim or right becomes merged in the other. But, second, the next section of the Code of 1876, 2201, puts this question at rest. That section reads as follows: "When a trust is created, or declared by any such instrument in writing, the recording thereof in the county where the lands lie, is equivalent to actual notice to every person claiming under a conveyance made, or lien created, after such recording." The three sections, from 2199 to 2201 inclusive, relate to one subject, are explanatory of each other, and must be construed together. Thus construed, the word lien in § 2201, shows what is meant by the words, "title of creditors," in § 2200. Title here is used in the sense of right.

Under these principles, the lien of Preston & Stetson dates back, by relation, to the time execution on their judgment was placed in the hands of the sheriff. The record fails to show, or even to aver, that they then had any notice of Mrs. McMillan's equity or claim. It follows that the chancellor erred in granting her relief.

The decree of the chancery court is reversed, and a decree
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here rendered dismissing complainant's bill, at the cost of her next friend in the court below and in this court.

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Action against Carrier for Non-Delivery of Goods.

1. *Consignee, delivery to; what may amount to.*—There are cases in which a carrier on a river may exonerate himself from liability for non-delivery of goods, although they were not delivered to the consignee, by proof that the goods were delivered at the landing to which they were consigned, in accordance with the well established custom of the community in receiving goods destined to that point; but such a custom must be shown to be a reasonable one in view of all the circumstances.

2. *Same; what not a delivery.*—A steamboat carrier, having goods consigned to a consignee at a particular landing, where there had been a warehouse-keeper who usually received and took care of goods landed there, can not avoid liability by proving a delivery of goods at the usual place on the river bank, without any protection or guard, when the landing had, in the meantime, been broken up by an inundation, and the washing away of the buildings, and the removal of the persons, which constituted it a landing.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

The appellee, H. A. Rice, brought suit against the appellants, Stone, Gray and Coleman, who were owners of the steamboat Clara, to recover damages for the failure to deliver a box of goods shipped from Mobile, and consigned to appellee at Gore's Landing on the Tombeckbee river.

The box of goods was delivered on board the Clara on the 9th day of May, 1874, and put ashore at Gore's Landing, three days afterwards, under the circumstances stated in the opinion, and was subsequently stolen. The appellants sought to defeat a recovery, by proving a delivery according to the usage and custom on that river, by landing and leaving the freight, as was done in that instance, and offered evidence tending to show that it is the "well established custom and usage of steamboats on the Tombeckbee river, to blow the whistle and ring the bell on approaching landings, to give notice that the boat was coming, and then to put off the freight, as the box of goods was put off, and proceed on the voyage, whether any one was there to receive the freight or not; that the custom was to blow the whistle and ring the bell as the boat was landing to give notice of the coming, and then putting off the freight ten feet perpendicular above the surface of the water, and proceed on the voyage, whether

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any one was there to receive the freight or not; that this known usage and custom to so land and deliver goods at Gore's landing had existed for many years, and that the plaintiff well knew of this usage and custom, and had been so receiving freight for many years."

The court, on motion of plaintiff, excluded this evidence, and the defendants excepted. The defendants asked several charges in writing, asserting, in substance, that the defendants were not liable, if the box of goods was delivered according to this custom and usage. These charges were refused, and defendants excepted.

The exclusion of evidence as to the alleged custom, and the refusal to charge as requested, are now assigned as error.

BOYLES & OVERALL, for appellants.—The custom and usage of trade should have been received. It entered into the contract, and excused a personal delivery to the consignee.—17 Wendell, 305; 6 Hill, 165; 53 Barbour, 214; 9 Iowa, 487; 3 Blatchford, 282; 40 Ala. 184; 29 Ala. 221; 49 Ala. 465. It was the consignee's duty to be on the alert, and take steps to protect his goods. Neither he nor his agents were at the landing, and the carriers were not bound to hunt him up, or keep the freight on the boat until he could be found.

JAMES BOND, for appellee.—There was no proof or offer of proof, of a custom or usage, to deliver goods at an *abandoned* landing, after the warehouse and keeper had moved elsewhere. What would be reasonable and proper, in a case where there was a delivery at a landing, where there was a warehouse and watchman, would be unreasonable when the landing was abandoned, and no one expected goods to be brought there.—*Ostrand v. Brown*, 15 Johns. 39; 15 Ill. 561; *Southern Express Co. v. Armistead*, 50 Ala. 350. Nothing was shown, therefore, equivalent to a delivery, even according to the alleged custom, and the court, in refusing the charges and excluding evidence offered, correctly held that the facts shown in evidence, were no defense to the action.

MANNING, J.—Appellee, plaintiff in the Circuit Court, sued appellants and recovered of them the value of a box of goods shipped from Mobile to him at Gore's Landing, on the Tombeckee river, by their steamboat, the Clara. Plaintiff, who lived four and a half miles from the landing, in the interior, ordered the goods by letter on the 15th of April, and they were shipped on the 12th of May following. In the meantime, on the 18th of April, heavy rains had caused an

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inundation of the banks at Gore's Landing, by which the warehouse and other buildings there were carried away, and the building in which the warehouse-keeper lived was undermined and made uninhabitable. No other house was in view from the landing, or was nearer to it than half a mile. The landing was in fact abandoned, there being no person staying there to receive or take care of goods that might be left thereat. Another landing was afterwards established at a distance of about half a mile higher up the river; though, this was done after the Clara went up on the occasion when she carried the goods in controversy. The condition of the place, known as Gore's Landing, and the effects of the freshet there, were obvious when, in open day, the Clara arrived; but she had not before been up the river after the freshet on the 18th of April.

According to the bill of lading, the box of goods was to be delivered to the plaintiff, H. A. Rice, or his assigns, at Gore's Landing, freight having been paid by the shipper. On approaching the place, the boat's "whistle was blown and the bell rung, and the boat landed and put off said box of goods, more than ten feet perpendicular above the surface of the water; and the river was falling at the time.

This box was put off at the landing, as other similar freight had been put off for this plaintiff before the freshet, time and time again;" but on such occasions previously, there was a warehouse-keeper there "who kept the landing as a public landing, and who received pay from plaintiff and others for his services as such warehouseman, and received and stored plaintiff's goods landed there before said freshet.

The evidence tended to show that the box of goods was stolen and lost to plaintiff."

The question presented for decision is, whether defendants might exonerate themselves from liability by proving that this mode of putting off freight at the landings on the river and at Gore's Landing, whether there was any person present to receive it or not, was in accordance with the custom and usage of river steamboats in delivering goods shipped by them for such landings?

We have no doubt that there are cases in which a delivery of goods not to the consignee thereof, or according to the letter of a bill of lading, may be shown to be in accordance with an established custom, and therefore valid. Many precedents of this kind are to be found in the books, and steamboats that ply on rivers in a sparsely peopled country, could not carry on their business, advantageously to the community, or for their owners, if they must, whenever they have goods for persons in the interior, to be delivered at

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landings along the river, wait until the consignees shall come or send in to receive them. And in such circumstances, it will doubtless happen that customs will grow up by usage which may be considered as entering into and modifying, to some extent, the contracts with such common carriers for the transportation and delivery of goods. Doubtless a deposit, sanctioned by usage, of the goods in question on the river bank, at Gore's Landing, within view of, and where they could be protected by the warehouseman, whether so protected in fact or not, would have been good.

But no custom, if it were possible for such a custom to grow up, could be upheld as reasonable, which would justify a steamboat carrier, who had goods consigned to a person at a particular landing on the river where there was a warehouse and a warehouse-keeper, who usually received and took care of goods landed there for the consignee,—in putting out such goods on the river bank without any protection, when the landing had, in the meantime, been broken up by an inundation and the washing away of the buildings and a removal of the persons that constituted it a landing.

All the assignments of error in this case are founded on the maintenance of the contrary of this proposition, and are, therefore, not well taken.

Let the judgment of the Circuit Court be affirmed.

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Indictment for Robbery.

1. *Robbery, indictment for; when will support conviction for larceny.*—There may be a conviction for grand larceny, on an indictment for robbery, if the felonious taking of goods of sufficient value be shown, accompanied by the aggravating circumstances necessary to constitute robbery.

APPEAL from the City Court of Mobile.

Heard before the Hon. O. J. SEMMES.

The indictment in this case charged Tude Allen with robbery. The counts of the indictment differed only as to the amount and denomination of the money charged to have been taken from the person of the persecutor; the value laid in each count exceeding twenty-five dollars. On the trial, the larceny of the property, to an amount exceeding twenty-five dollars, was proved, "but the evidence failed to show that any force was used." The court instructed the jury, in substance, that they might convict the defendant of grand

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larceny, if they found that the prisoner feloniously took and carried away from the person of the prosecutor the money described in the indictment, or any part of the same, to an amount exceeding twenty-five dollars in value, with the intent to convert into the prisoner's own use. The defendant excepted to this charge, and having been convicted and sentenced for grand larceny, appeals, and here assigns the charge as error.

JOHN H. GLENNON, for appellant.—While robbery is not a statutory offense, in this State, yet its punishment is fixed by statute; and as larceny is a statutory offense in all its grades, defined in various phases, and punished differently, this offense and robbery are entirely of a different class, and a conviction of the former cannot be sustained under a charge of the latter, under our statutes.

JNO. W. A. SANFORD, Attorney-General, *contra*.—Robbery is but an aggravated larceny—a larceny committed by force or violence. The theft from the person, when not accomplished by violence, or putting in fear, is grand or petit larceny, according to the value of the property stolen. On principle, it would seem there can be no doubt of the correctness of the charge given by the court below.

MANNING, J.—The question raised in this case is, whether or not a defendant, indicted for robbery, may be found guilty of grand larceny.

In 1 Russell on Crimes, 905, it is said: "In robbery from the person, as in other complicated or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely, the fear, or violence, and found guilty of the simple larceny." Turner's case (in 1 Leach. 536) is referred to as authority on this point.

Robbery itself is defined as "a felonious taking of money or goods, of any value, from the person of another, or in his presence, against his will, by violence, or putting in fear." The felonious taking of the money or goods is a constituent element of the offense, and that is larceny. And if the goods stolen exceed in value \$25, the taking of them feloniously is grand larceny under our statute.

The jury, by their verdict, find that they were taken feloniously, and were of a value exceeding \$25, but without the circumstances of aggravation—violence or putting in fear; and we think our statutes have made no such changes, as would prevent them from doing so under an indictment for robbery.

Judgment affirmed.

(Haney, pro ami, v. Lundie et al.)

Haney, pro ami, v. Lundie et al.*Taxation of Costs against Statutory Estate of Married Woman.*

1. *Statutory estate of married woman; when may be subjected to costs of suit.* The statutory separate estate of a married woman, brought within the jurisdiction of the Chancery Court, by her institution of a suit with respect to it, may be subjected, on execution against it, for the costs of suit, after fruitless execution therefor against the next friend; and although she may appeal to the Supreme Court, without giving security for costs, such part of her statutory estate will be liable for the satisfaction of the costs here, if the appeal be decided adversely to her.

2. *Same.*—The execution in such a case must be satisfied out of the statutory estate within the jurisdiction of the court, and can not run against the married woman personally, or her goods, chattels, or estate generally.

APPEAL from Dallas Chancery Court.**Heard before HON. CHARLES TURNER.**

The appellant, Florence V. Haney, by her next friend, filed this bill against her husband, and one B. M. Lundie and his wife. Appellant was a married woman, possessed of a statutory estate, consisting of certain lands in the city of Selma. Lundie also owned a house and lot in the same city. After some negotiations between Lundie and appellant's husband, it was agreed between Lundie and appellant and her husband, to exchange lands, Haney giving \$500 in county claims in addition to Mrs. Haney's lot, for that of Lundie. In pursuance of the agreement, the parties mutually executed conveyances and put each other in possession of the property so exchanged, Lundie conveying to appellant in terms which constituted the lot her statutory estate. Appellant sought by her bill to annul and rescind the contract, and to have a reconveyance, etc., on the ground of alleged misrepresentations by Lundie to her husband, as to the healthfulness, rental value, and state of the title of the lot he exchanged with appellant; and offered to reconvey to him the lot received in the exchange, which she still held. Much testimony was taken. Lundie flatly denied the making of the representations, and Haney, the person to whom it was alleged the representations were made, and who alone testified they were made, was impeached. The chancellor, on the final hearing, on bill, answers, and testimony, dismissed the bill, and ordered that the costs be taxed against appellant's next friend, and that execution issue against him therefor.

Afterwards, and without any notice to, or appearance on
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the part of appellees, the register filed his petition in court, showing that, although the next friend was good for the costs when he became such, he afterwards became insolvent and costs could not be collected out of him, and that the execution issued against him for costs had been returned "no property;" wherefore the register prayed that the costs be re-taxed, and that the court "make an order by which the property of complainant, as set forth in the pleadings, be made liable for the costs of suit, and that execution may issue therefor to be levied on said property." The chancellor made an order, reciting that it appeared to the court, that the facts stated in the petition were true, and "that said suit was instituted by a married woman, in a matter touching the title to her statutory separate estate, and that she is now possessed of an estate in her own right," wherefore he ordered and decreed, that "she do pay the costs therein taxed, and that execution therefor issue against her, to be levied on the goods and chattels, lands and tenements of her estate."

The appellant made the statutory affidavit, and brought the case here by appeal, without giving security for costs.

The decree dismissing the bill, and the order of the chancellor with reference to costs, are now assigned as error.

REID & MAY, for appellant.—The object of having a next friend, is that he may pay costs, if the proceeding is not well founded.—1 Daniel Chancery Prac. 144; also, page 146. There is no case in which a personal decree can be rendered against a *femme covert*.—1 Maddox Chancery, 473. The statutory estate is liable only to the extent to which the statute creating it subjects the property. The law of costs should be construed most strictly against the officer, and if there be doubt, it should be decided against him.

PETTUS & DAWSON, *contra*, contended that the decree on the merits was undoubtedly right, and that appellees were not concerned in the contest between the register and the appellant, as to taxation of costs after the fruitless execution against the next friend, and therefore moved to strike out the assignment of error with reference to that matter.

MANNING, J.—Admitting all the evidence which appellant's counsel insist was admissible in her favor, and to which the assignments of error relate, yet we are compelled to the conclusion that she was not entitled to the relief prayed for, and that there was no error in the decree of the chancellor denying it. No good could arise from reproducing in this opinion the substance of the voluminous testimony, in the

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cause, for the purpose of showing that it authorized the decree; it is sufficient to say that no impartial mind could, through this evidence, reach a different conclusion. That decree is therefore affirmed.

Dismissing the bill, which was filed by appellant through Jno. Hardy as her next friend, the chancellor ordered that the costs be taxed against the latter; which was evidently proper. And after a return of the writ of execution therefor against him, "no property found," B. H. Craig, the registrar of the court, to whom a large portion of the fees were due, by petition prayed the court to make an order "by which the property of the complainant, as set forth in the pleadings in said cause, may be made liable for the costs, and that execution may issue therefor, to be levied upon said property." This property was of the statutory separate estate of appellant.

Notice of the petition having been served, and a defense made on behalf of appellant, the chancellor "ordered, adjudged and decreed that she do pay the costs herein taxed, and that execution therefor issue against her, to be levied of the goods and chattels, lands and tenements of her estate." And this decree is assigned as error.

On the part of appellant, it is contended that a married woman is never liable to a decree for costs; that only her next friend is, in any case, answerable for them; and that this is the reason why the rules of court require that she should sue by next friend. In this, her counsel are not sustained by the authorities. Referring to several decided cases on the subject, a writer of the highest character on pleading and practice in courts of chancery, says: "Upon filing a bill in chancery, either by her next friend, or *in forma pauperis*, a married woman, in respect of the suit, is held to have taken upon herself the liabilities of a *feme sole*, and therefore may be attached; and her separate estate becomes liable to pay the costs incurred.—1 Dan. Ch. Pl. and Pr. (4th Ed.) 113. And although, in general, it is only the separate estate which the married woman has at the time of the transaction in respect of which, it is sought to charge her with a liability, that a court of equity will subject to the satisfaction of it; "where the court thought a married woman defendant ought to pay certain costs, and it did not appear she had a separate estate, the court gave the plaintiff liberty to apply for payment of those costs in case of any moneys becoming payable to her separate use."—*Ib.* 187. These rulings, of course, relate to a married woman's equitable separate estate. Is or is not the separate estate which is secured to her as such by our statutes, also liable? The question is not free from difficulty.

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It has been settled by repeated adjudications of this court that the property of such estate cannot be alienated by deed, or conveyed away except by husband and wife jointly, as authorized by section 2373 of the Revised Code; and the statute does not expressly subject it to the payment of any other debt created by the contract of either, except "for articles of comfort and support of the household, suitable to the degree and condition in life of the family."—§ 2376. Treating these sections as parts of an enabling statute, it has, consequently, been held that debts created for other purposes, even by contracts of the husband made with individuals for the improvement of the wife's property, could not be charged upon, or satisfaction thereof be coerced from, such property. Is this true, also, of the court costs created in a suit brought by or against a wife, for the assertion or defense of her rights, or supposed rights, in respect to property of her separate estate?

By another section (2525) of the Revised Code, relating to civil actions in courts of common law, it was enacted that, "Husband and wife must be joined either as plaintiffs or defendants, when the wife has an interest in the subject matter of the suit, unless the suit relate to her separate estate, when she must sue or be sued alone." The separate estate here referred to is held to be her statutory separate estate. And by rule 15th of the chancery practice, in the form in which it existed until this year, "all bills and petitions filed by married women, without their husbands, whether relating to their separate estates or not, must be exhibited by next friend."

These were express provisions made by statute, or authority conferred by statute. Did they not, in effect, enable the wife, by bringing such suits, to subject the property in respect of which they are brought to payment of court costs therein? If they did not, then either the officers of court would not get for their services the fees which the law says they shall be entitled to have, or they must be paid by somebody else. There is no one else against whom the costs she creates can be taxed; when she sues alone, and when she sues without her husband, in equity, although she has a next friend, her *prochein ami*, to be responsible, she is required to get him to be her sponsor for them, only because no judgment therefor can be rendered against her personally. But, as we have seen, if she has a separate estate, and it is established in that cause, that she has, and of what such separate estate consists, the court may subject it to the payment of the costs taxable against her. This seems to us to be legal, as well as just, and to be as applicable in a case like the present as in any other. Although no judgment can be ren-

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dered against her personally, yet when her separate property is brought within the jurisdiction of the court in a cause, it can be subjected to the payment of proper charges therein. We are of the opinion, therefore, that the costs in this cause were chargeable upon the property shown to belong to her, as her statutory separate estate in the present cause.

But the decree of the chancellor is against appellant personally to be levied of the goods and chattels of her estate generally—that is, of any property that may belong to her, without specifying any as chargeable with the costs. In this the chancellor erred. And the decree must be here so amended as to charge the costs upon, and authorize execution therefor to issue against, the lots and house conveyed to appellant by the deed of B. M. Lundie and wife to her of the 28th day of September, 1871, and described as such in the bill of complaint.

The appellees in this court had nothing to do with the proceeding in which the decree of the chancellor here referred to was rendered. And appellant was allowed, according to a statute on the subject, to bring the cause before this court for revision, without being required to furnish security for the payment of the costs. The costs of the appeal in this court, therefore, must be taxed against appellant, and be charged upon, and the execution therefor issue against, the same property last above specified.

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Bill in Equity to settle Administration.

1. *Administrator; how holds estate after debts are paid.*—After the debts are paid the administrator has charge of the estate for the benefit of the heirs, and a court of probate can not investigate and settle transactions between them which do not strictly pertain to the office of administrator.

2. *Same; what credits entitled to.*—Where the administrator, at the request of the widow and heirs, who were minors over fourteen years of age, consents to perform his office so as to supply the place of a guardian for them, he is entitled to credit for reasonable expenditures for their benefit; and if in so doing he has not left in his hands a residue sufficient to meet the expenses of the administration, the estate of which he was administrator will be subjected to their payment by a court of equity.

APPEAL from Chancery Court of Perry.
Heard before HON. CHARLES TURNER.

The opinion states the case,
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W. L. BRAGG, for appellant.—The bill in this case avers special equities in the administrator of which the probate court could not take cognizance, and they show conclusively that the Chancery Court is the only forum where complete justice can be obtained. The Code expressly makes the estate liable for the costs of administration.—R. C. § 1888, 2060–64. The disbursements of the administrator, in the course of administration, have exceeded his receipts, and he can only obtain relief in chancery.—34 Ala. 565; 16 Ala. 733; 4 Ala. 632; 13 Ala. 91. The heirs are insolvent, unable and unwilling to reimburse the administrator the amounts paid out for them. Their only property consists of their interest in the estate. These expenses were made at their request and upon the faith of their giving him credit for them as administrator. Under the facts in the case, the Chancery Court can and should take direction of the administration of the estate, and sell a sufficiency of the land to pay the fees and charges of administration, and reimburse the administrator for the advances he has made to secure the rights of all.—17 Ala. 59; 15 Ala. 91; 31 Ala. 207; 51 Ala. 447.

JOHN F. VARY, *contra*.—The account and settlement can not be removed from the Probate Court into the Chancery Court unless there is some special equity which makes it necessary and requires that such removal should be made.—36 Ala. 109; 33 Ala. 239; 19 Ala. 438; 13 Ala. 269. If the application for the removal is made by the administrator, it can not be allowed, if the equity upon which he seeks the removal arises out of his own carelessness or recklessness, or out of any of his acts wherein he acted with full knowledge of all the facts, as appellant did in this case.—36 Ala. 118, and authorities *supra*; 18 Ala. 379. The facts of the case bring it fully within this last rule, as there is not an averment of ignorance of any fact connected with the case.

MANNING, J.—Appellant, Bailey, in 1869, became administrator of Needham H. MUNDIN, and in 1871 had paid all his debts, from the crops and by sale of some perishable chattels. In the latter year, he sold the remaining personal property. MUNDIN left a widow, Nancy B., and two sons, William P. and Walter C.—the sons being minors—all of whom were defendants in this suit below. By their request and solicitations, and to save the expense of a regular guardianship for the minors, Bailey, being administrator, consented to act the part of guardian also for them, and continued to do so until lately. He provided money for their support and education, and furnished a considerable amount to their

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mother, the widow. She received \$3,304.31-100; besides which, he spent upon William \$2,235.52-100, and on Walter \$1,617.17-100. Of the land, 190 acres were assigned in 1871 to Mrs. Mundin for her dower; and the remainder, 490 acres, were leased out by the administrator in 1871, 1872 and 1873; and since the latter year, Wm. P. and Walter have received the benefit thereof to their own use.

The bill sets forth, further, that acting in a spirit of kindness towards the minors, as if they had been his own sons, and having great confidence in them, and in their assurances that he should be held harmless on account of such expenditures, complainant had advanced to them and their mother various sums of money out of his own means; the amount of the debts of intestate which he had paid, and of the sums paid to and for the widow and minors, exceeding (according to the amendment offered to the bill) the whole amount of assets, exclusive of the land that had come to complainant's hands, by \$840.05-100, without interest; that there had been, also, a suit brought against him, as administrator, in February, 1875, involving an amount of about \$7,000, which was decided in the Spring of 1876, after strenuous litigation, in favor of the intestate; for the defense of which suit, he was obliged to employ counsel, to whom fees were due for their services to the amount of about \$1,200; that there were due, besides, as fees, to the late and present judges of the Probate Court of Perry county, which had charge of the administration of the estate, about \$140; that there was due to him as commissions for his services as administrator \$762.59; and that there was due to him besides, for his superintendence and management of the farming interests, and for attorney's fees, a large amount more; that the only property now remaining of the estate, was the 490 acres of land aforesaid; of which Wm. P. and Walter, the latter still a minor, when the bill was filed, were enjoying the benefit; and their reversion in the dower land; that without this land they are insolvent, and unable to respond for the amount they owe complainant; that he, as administrator, having, in obedience to a citation which they had caused to be issued, filed his account for a final settlement of his administration, in the Probate Court, and having charged therein the moneys he had as aforesaid expended for their benefit, and for the benefit of their mother, and other sums aforesaid, with which the estate is chargeable, the said Nancy, William and Walter have filed objections to said charges, and are endeavoring to have the burden and loss of them, and of the other charges and dues aforesaid, cast upon him, the administrator; that he is advised he can not have these matters properly inves-

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tigated and adjusted, and the land sold to pay said charges, otherwise than in a court of equity; wherefore he prays that the said Nancy B., William and Walter be enjoined from coercing a settlement, in the Probate Court; that the administration and settlement thereof, be removed into the court of equity; and that the land be sold to pay the charges aforesaid, or for such relief as he may be entitled to.

A demurrer was filed to the bill by Walter C. Mundin, on his coming of age, in January, 1877, which was sustained, and an amendment afterwards offered was disallowed by the chancellor and the bill dismissed. From those orders, the appeal is taken to this court.

The case made by the bill seems to be one of that not very uncommon kind, in which mutual confidence and regard induce persons who mean to do right, to become imprudently liberal, on one side, in the administration, and on the other in the use of effects belonging to a trust fund; in consequence of which, when the time of settlement arrives, it brings with it disappointment with the smaller amount than was expected, remaining for the discharge of advances or liabilities, or for distribution among the beneficiaries. Hence, there often follow, first, unjust suspicions, and then unjust demands, and vexatious and expensive litigation. This seems to be the situation in which the present parties now stand toward each other. It is probable that a considerable amount of the charges objected to should be allowed, against one or more of the defendants; and it seems, so far as we can judge in the absence of the evidence, not yet taken, that some of the demands made on behalf of the administrator, are out of proportion to the value of the estate, and to the services that were rendered. If the matters in dispute could be adjusted between the parties, (now all of age), the result would be apt to be more satisfactory to them hereafter, than any decision a court may make in the cause.

After the debts of the deceased were paid, the administrator had charge of the estate, for the benefit of defendants only. He stood, as administrator, in the relation of trustee for them, and they as *cestuis que trust* towards him. In these circumstances, transactions took place between them not strictly pertaining to the office of administrator, merely, and which a court of probate can not investigate and settle.

"If a person," (says Mr. Perry, in his work on Trusts, 2d vol., § 910), "undertakes an office for another, in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. Thus, a trustee will be reimbursed all his necessary travelling expenses, and all reasonable fees paid for legal advice in the

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discharge of his duties, . . . all costs which he is ordered to pay to strangers, if the litigation was forced upon (him), or was necessary for the protection of the estate." And again: "What the court will allow upon suit, may be done by the trustee without suit. * * * * So, trustees may expend moneys for the support of an infant, if the court shall subsequently approve of the expenditure."—§ 915. And again: "It is a rule that the *cestui que trust* ought to save the trustee harmless, when the trustee has honestly, fairly, and without possibility of gain to himself, paid out money for the benefit of the *cestuis que trust*."—§ 485. These propositions are sustained by adjudged cases cited by Mr. Perry.

It is common knowledge that since the war, it is very difficult to get fit and responsible persons to act as guardians for minors; and difficult for those willing to act as such to furnish the sureties required by law. Yet it can not be permitted to persons to take to themselves the privileges and compensation of such an office, except in compliance with law. Complainant in this case, did not become legal guardian, and he can not, therefore, be allowed any commissions, or pay for services done in that capacity. We understand from the bill he does not claim any. But if, when there was no legal guardian, he consented, at the solicitation of the minors, then over the age of fourteen years, and of their mother, so to perform his office of administrator as to supply the place, and save them from the expense of a guardian, and he has faithfully, economically, and with a due regard to their condition, and fortune, expended a portion of their means, not exceeding what a regular guardian would be authorized to use for such purposes, in providing for their support and education, respectively, natural justice and equity require that he should have due credit for moneys so expended for their benefit. And if in so doing, he has not left in his own hands a residue sufficient to discharge the costs of the administration, and the expenses of a suit brought against him, as administrator, which it was his duty as such to defend, the estate of which he was administrator, ought to be in some way subjected to the payment of it; whether out of the income only, or out of the corpus of it, will depend upon the facts to be developed.

We think the case made by the bill such as a court of probate was not competent fully to investigate and determine; and that the administration should be removed into a court of equity. The chancellor erred in refusing permission to amend the bill, and in dismissing it, and his decree is therefore reversed.

Let one-half of the costs of the appeal in this court, and
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in the court below, be charged against appellant individually, and the other half against appellees.

Ex parte Webb.

Petition for Mandamus.

1. *Selma, charter of; certain provisions construed.*—The provisions of the charter of the city of Selma, declaring the person in possession of property sold for city taxes, who refuses to deliver it to the purchaser, "shall be guilty of unlawful detainer, and the purchaser may institute suit before any justice of the peace, to recover possession," if valid, about which no opinion is expressed, are not to be construed as subjecting the proceeding, thus authorized, to the rules which regulate the action of unlawful detainer, between landlord and tenant, or where only the right of possession is involved; the proceeding authorized by the charter, partakes more of the nature of ejectment, or the statutory real action, than of unlawful detainer, and is governed by the general rules applicable to the former class of actions; and there must of necessity be an inquiry into the merits of the title; and where judgment is rendered in the justice's court against the tenant, the landlord may intervene and appeal.

2. *Same; what not cause for dismissing appeal.*—Where judgment is rendered against the tenant and the landlord appeals to the Circuit Court, the appeal will not be dismissed, or the cause stricken from the docket, because the tenant did not appeal; or because a bond, in compliance with the statute, was not given, if the appellant is able and willing to give a proper bond.

This was a petition by Webb for mandamus, to be directed to the Hon. GEORGE H. CRAIG, presiding over the Circuit Court of Dallas, to compel him to strike a certain cause from the docket; a motion to that effect having been made before him and overruled.

The facts shown by the petition are as follows: Webb purchased a certain lot of land in the city of Selma, at a city tax sale; paid the amount of his bid and received a certificate of purchase, in accordance with the provisions of the charter of that city. The premises, consisting of a brick store and lot on which it was built, were then in possession and occupancy of Carlisle, Jones & Co. Webb demanded possession, and that they should pay him rent, and both of these demands having been refused, brought unlawful detainer against them, before a justice of the peace, to recover possession, and damages for the detention. The defendants not appearing, Webb offered testimony before the justice of the peace, who rendered judgment for recovery of possession, and sixty dollars damages. After this, Mary Bradfield, J. W. Bush, L. H. Pitts and M. L. Ernst, filed in the

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justice's court, a written acknowledgment that they were security for costs on appeal, in the cause to the Circuit Court from said judgment."

At the same time the security for costs of appeal was given, the same persons filed with the justice a bond, signed by them, and in the penalty of six hundred dollars, payable to Webb, "upon condition, that if the above bound Mary Bradfield shall prosecute to effect an appeal by her taken this day to the next term of the Circuit Court from a judgment rendered, against Carlisle, Jones & Co., her tenants in possession, in favor of Norman Webb on unlawful detainer of a certain" lot, "now occupied by said Carlisle & Jones as such tenants, by Abner Jones, justice of the peace, in and for said county. Now, as above stated, if said Mary Bradfield shall prosecute such appeal to effect, and pay all such rents as may accrue on said property, at an annual rent of three hundred dollars per annum, as may accrue during the pendency of said appeal, if she shall be held liable therefor in said Circuit Court, then this obligation to be null and void, otherwise to remain in full force and effect." No approval of the bond or security for costs was indorsed thereon in writing by the justice, but he treated the case as having been properly appealed, and certified his proceedings, and sent up the original papers to the Circuit Court.

Webb made a motion in the Circuit Court to strike the cause from the docket, and to dismiss the appeal, and for an order of *procedendo* to the justice, on the grounds: 1st, that Carlisle, Jones & Co. did not take the appeal, but it was attempted to be taken by one not a party to the suit; 2d, there was no appeal bond given by the defendants; and 3d, that the undertaking on file was not conditioned according to law, and no appeal should have certified to the Circuit Court. It was shown on the hearing of the motion, that Carlisle, Jones & Co. were tenants of Mrs. Bradfield; that they refused to take an appeal, but consented that Mrs. Bradfield might take an appeal in their names, provided they were protected against cost and expenses; and under these circumstances Mrs. Bradfield caused the execution and filing of the security for costs and bond above referred to. The court overruled the motion.

W. C. WARD, for petitioner.—In appeals from judgments of justices on unlawful detainer, the unsuccessful *party* must execute an appeal bond, payable to the other party.—Code, § 3711. The appeal bond must be executed by the *party* praying the appeal.—Code, § 3710. In the Circuit Court, if the plaintiff recovers, judgment must be against *appellant* and

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his sureties for costs, and against *appellant* and *his sureties* on the supersedeas bond for rents.—Code, §§ 3712-3. In this case the defendants took no appeal, and gave no *supersedeas* bond, and no judgment can be rendered against them and the parties as sureties, who gave the undertaking and bond set out in the record, because they do not sustain the relation of principal and sureties; and the judgment rendered against the sureties in such cases, can only be rendered under the statute, and the bonds must comply with the statute.—4 Ala. 315. This is not the case of a defective bond, where an appeal has been taken. There is no appeal here. Mrs. Bradfield is a stranger to the judgment, and can not meddle with it.—*May v. Watson*, 6 Ala. 133; *May v. Courtenay, Tenant & Co.* 43 Ala. 617. An appeal by a stranger will not give jurisdiction.—20 Howard, 218. Mandamus is the proper remedy.—*Moses on Mandamus*, 19; *Ex parte Cole*, 28 Ala. 50; *Ex parte Morgan*, 30 Ala. 51.

LEE & BUSH, *contra*.—Mrs. Bradfield is not a stranger to the suit. She had a right to appear and defend the possession of her tenants.—Code, § 2955; 4 Ala. 353; *Taylor on Landlord and Tenant*, § 173. Besides this, the court having jurisdiction by the appeal, its refusal to strike the cause from the docket can not be revised or corrected by *mandamus*.—4 Otto, 418; *Ex parte Elston*, 25 Ala. 73; *Ex parte Putnam*, 30 Ala. 593.

BRICKELL, C. J.—The purchaser of lands sold for taxes, has no other remedy at common law to recover possession, than an action of ejectment.—*Blackwell on Tax Titles*, 576; *Cooley on Taxation*, 371. The charter of the city of Selma declares, that in the event of the failure or refusal of the person in possession, to surrender to a purchaser at a sale for the payment of city taxes, such person “shall be guilty of an unlawful detainer, and the purchaser may institute suit before any justice of the peace in the city of Selma, for the recovery of the possession of said premises, and damages for the detention thereof. From the judgment of such justice, an appeal may be taken to the Circuit Court of Dallas county, as in other cases of unlawful detainer.”—*Pamph. Acts*, 1874-5, 375, § 47. We do not now propose to express any opinion as to the validity of this enactment. The necessities of the present case are satisfied, when we say that it must not be construed as subjecting the proceeding it authorizes to the same rules which regulate and control the action of unlawful detainer between landlord and tenant, or when simply the right of possession is involved. Then, posses-

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sion is a necessary element of the plaintiff's case; and the defendant, having obtained possession from the plaintiff, must, after the termination of his possessory interest, have refused to surrender.—*Devine v. Brown*, 35 Ala. 596. In such cases there is and can be no necessity for an examination into the estate, or the merits of the title.

The proceeding by the purchaser at the tax sale, is founded on the theory that he has acquired title by his purchase, and the title draws to it the possession. There is no prior possession on which he can rely—nor can it be asserted that the party in possession derived it from him, or by an entry under one deriving it from him. Unless the party proceeded against is deprived of all right of defense, or his right of defense is narrowed and circumscribed so that generally it would be valueless, there must, of necessity, be an inquiry into the estate, or merits of the title. The proceeding the statute authorizes, has, necessarily, more of the elements, and bears a greater analogy to an action of ejectment, or the statutory real action, than to an action of unlawful detainer proper. A legislative declaration that the party withholding the possession is guilty of an unlawful detainer, and that suit for the recovery of possession, and damages for the detention, may be commenced before a justice of the peace, cannot be so construed as in effect to disseize a man of his freehold, and convert his estate into a mere right of action.

The statute (Code of 1876, § 2955) requires that when a real action is against a tenant, the landlord must, on motion, be made a party defendant. Whether this statute is not a mere affirmance of the common law, or confers on the landlord a new right, is not important.—*Arent v. Read*, 2 Port. 480; *Lawson v. Orear*, 4 Ala. 156; *Tyler on Ejectment*, 442, *et seq.* The existence of such a rule is indispensable to the protection of the party really interested to defend the action against the negligence or the fraud or collusion of the tenant in possession. The statute in promotion of this, its manifest purpose, has been liberally construed. The technical relation of landlord and tenant has not been deemed indispensable to its operation. Whoever claims title, consistent with the possession of the occupier, and as against him, has an immediate right of entry, may be allowed to defend as landlord.—*Thompson v. Ives*, 11 Ala. 239; *Falkner v. Jones*, 12 Ala. 165. An extension of the statute to this proceeding, which, by whatever name it may be called, is in fact an action against the tenant in possession, in which the plaintiff can recover only on the strength of his title, and in which the title is, of necessity, involved, is not unwarranted. It is necessary for the protection of the landlord against the un-

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willingness of the tenant to engage in litigation, or his negligence or fraud. The statute, in very general terms, applies the provisions of the Code, in the regulation of suits in the Circuit Court, to suits before justices.—Code of 1876, § 3662. In cases of this kind, there being no statutory provision preventing, the statute allowing the landlord to intervene can well be regarded as applicable, not only to suits in the Circuit Court, but to analogous suits before justices of the peace.—*Gould v. Meyer*, 36 Ala. 565. Of course it could have no application to the ordinary suits of unlawful detainer, or forcible entry and detainer.

The landlord of the tenants in possession had the right to intervene and prosecute an appeal from the judgment of the justice of the peace. She is not a stranger, intermeddling in a suit in which she is without interest. The bonds executed by her, may not be statutory bonds, on which judgments may be rendered against her and her sureties summarily. They are valid common law obligations, and if the petitioner deems it necessary for his protection, on a proper application to the Circuit Court, the landlord may be formally substituted as the party defendant, and the party appellant, and required to execute sufficient statutory bonds. It is the mandate of the statute, which but follows the former decisions of this court, that no appeal or *certiorari* for the revision of judgments of justices of the peace must be dismissed for any defect in the bond, if the party is willing to execute a sufficient bond or undertaking.—Code of 1876, § 3126.

The Circuit Court properly refused the motion of the petitioner to strike the cause from the docket, and the application for mandamus is denied at his costs.

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Bill in Equity to enjoin Administrator's Sale of Lands, &c.

Administrator; when will be enjoined at instance of heirs from selling lands of intestate to pay expenses of administration.—A court of equity, at the instance of adult heirs, who paid up all the debts of their ancestor except a very trifling amount due a single creditor, and divided his lands among themselves, will enjoin a sale of the lands to pay expenses of administration and costs of litigation carried on by an administrator, who, without being so requested by the creditor or any heir, sued out letters and engaged in litigation, for the avowed and selfish purpose of running out of the country a person in possession, and buying the lands himself.

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APPEAL from Chancery Court of Pike.

Heard before Hon. ADAM C. FELDER.

The heirs at law of William Childs, deceased, filed this bill against the appellant, Owens, praying, among other things, that he be enjoined from selling certain lands of the intestate, for payment of the expenses of administration and costs of certain litigation carried on by Owens, who, without being requested by the heirs or the only creditor, to whom an insignificant sum was due, sued out letters and carried on litigation, for certain avowed and selfish ends of his own. The opinion sets out the facts.

The cause having been submitted on pleading and proofs, the chancellor granted an injunction as prayed, and this decree is now assigned as error.

WATTS & WATTS, and J. D. GARDNER, for appellant.

JERE N. WILLIAMS, *contra*.

MANNING, J.—William Childs, who was owner of the land, situated in Pike county, Alabama, which is the subject of this controversy, died in the State of Arkansas, in the year 1861. Owing no debts, or only a few small ones, that were paid by his children, then all of full age, they, in the early part of 1862, divided his property among themselves, by agreement. The Pike county land, 160 acres, was allotted to and taken by the appellees, sons of said William, who were complainants in this cause in Pike Chancery Court, and the rest of the family of deceased, all lived in other States, Arkansas, Texas, and Louisiana, and were all satisfied with the disposition made of their father's property. At least, it was not at the instance of any of them that proceedings were taken by the appointment of an administrator, to have the land in Pike county sold; nor was this done at the instance of any creditor here. Indeed, it is not certain that there was any creditor of Wm. Childs in this State. The only person supposed to be so, put the amount due to him at twenty dollars, and, although he was well acquainted with the family of Childs, never claimed payment of it from any of them, even when one of them came out to see about the land, and met and conversed with him here. Nor does it appear that he ever solicited the appointment of an administrator in Alabama, in order to obtain payment of such a debt. True, he says he spoke of it to Owens before the latter became administrator, but he did so at his own house in a conversation which Owens sought with him there. Indeed, Owens seems to have been more desirous to encourage

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him to set up a claim as creditor, than he was to induce Owens to become administrator.

The objects of the latter, who sued out letters of administration in September, 1869, and two days afterwards filed his petition to have the land sold, are frankly stated in a letter he afterwards wrote to LaFayette Childs. These objects were, *first*, to get one Hurst, who was in possession of the land, out of it, and out of the country, and *secondly*, to buy the land himself. In his endeavors to accomplish these purposes, he seems to have created a bill of costs, and attorney's fees, of several hundred dollars, an amount equal to, or exceeding one-half of the value of the land, and he is now insisting on having it sold, to pay them. To allow this to be done under such circumstances, would be inequitable as well as inhospitable. It is no part of the policy of our laws, concerning the administration of estates, to encourage an unnecessary and oppressive interference with the rights of heirs and others, and the courts should not allow them to be so used. We are of opinion that the appellees were entitled to relief by injunction.

Let the decree of the chancellor be affirmed.

Fore, Adm'r, v. McKenzie.

Action on Promissory Note.

1. *Misrepresentation; what will avoid sale.*—A misrepresentation by the seller, which will avoid the sale, or defeat an action for the recovery of the purchase-money, must be of a material fact, operating as an inducement to the purchase; and the purchaser having a clear right to rely on it, must be deceived thereby.

2. *Caveat emptor; to what, maxim applies.*—The maxim, *caveat emptor*, applies to judicial sales; the purchaser has no ground of complaint if the title sold proves valueless, and can not defend an action at law for the purchase-money, because of misrepresentations of the administrator in making a sale of land under order of the court of probate.

3. *Sale of lands; what principle not applicable to.*—The principle declared in *Atwood v. Wright* (29 Ala. 346), as to the fraud or misrepresentation of the administrator making a sale, is confined to sales of personality.

APPEAL from Circuit Court of Monroe.

Tried before Hon. JOHN K. HENRY.

The appellant, Fore, as administrator of the estate of one James Fore, deceased, brought suit against the appellees to recover \$1,200, the amount of a promissory note given by

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109	124
58	115
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them for lands of appellant's intestate, which Fore had sold under order of the probate court.

The appellees pleaded that Fore had represented at the time of the sale that the lands were the property of the estate, and the title was good; whereas a part of the tract sold by the administrator, and for which, along with other lands, the note was given, had been sold and conveyed by intestate in his life time to one Grant, and by reason of this, they have been damaged six hundred dollars, and the consideration of the note has failed to that extent, and they had tendered Fore the balance due on the note after deducting said sum.

The plaintiff demurred, because the plea was double, being part failure of consideration, also a plea of tender; 2d, because the sale was judicial, and want of title is no defense to the action; 3d, because the facts stated were no answer to the complaint. This demurrer was overruled, and a trial was had, resulting in verdict and judgment for the plaintiff for \$347.91. The plaintiff appeals, and assigns the ruling upon demurrer as error.

J. W. POSEY, for appellant.—This was a judicial sale, to which the maxim of *caveat emptor* applies.—21 Ala. 534; 47 Ala. 444; *Bland v. Bowie*, 53 Ala. The case of *Atwood v. Wright*, is relied on; the misrepresentation there was fraudulent, and was, as to *soundness*, not title of property sold. Besides this, the plea does not show that any reliance was placed on the representations.—16 Ala. 789.

J. M. WHITEHEAD, *contra*.—Misrepresentation by the administrator, will no more relieve him from the consequences of his acts than they would exempt an individual.—19 Ala. 680; *Atwood v. Wright*, 29 Ala. 346.

BRICKELL, C. J.—The misrepresentation by a seller which will avoid a contract of sale, or furnish matter of defense to an action for the recovery of the purchase-money, must be of a material fact, operating as an inducement to the purchase; and the purchaser having a clear right to rely on it, must have been deceived by it. The plea does not aver a state of facts which brings the defense within the principle. There is no averment that the misrepresentation in reference to the title, induced the purchase; or that the purchaser, being ignorant of the true state of the title, relied upon and was deceived by it.

If the plea contained the averments, it would not present an available defense. The sale was judicial—the court of probate was the vendor, and the administrator but its officer

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or agent. To such sales the maxim, *caveat emptor*, is strictly applicable. There is no warranty of title, and the purchaser has no ground of complaint, if the title sold proves valueless.—*Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210. The representations of the agent or officer making the sale, as to the title, the purchaser has no right to rely on, but must inquire for himself. If a fraud is practiced on him, the sale is incomplete before confirmation, and he may make it ground of objection to confirmation. If the fraud is not discovered until after confirmation, in a proper case, a court of chancery would intervene for his relief. The sale after confirmation, clothes the heirs with rights which can not be disturbed, unless an opportunity is afforded to support them. There can be no rescission of the sale, in whole or in part, without the opportunity to them of sustaining its validity.—*Lampkin v. Reese*, 7 Ala. 170; *Bland v. Bowie*, 53 Ala. 152. Hence, the purchaser can not at law defend an action for the purchase-money, because of the fraud or misrepresentation of the administrator. To permit such a defense, would operate in a collateral proceeding, a rescission of the sale made, and confirmed by another court, having exclusive jurisdiction.

The case of *Atwood v. Wright*, 29 Ala. 346, has no application to the question. It was a sale of personal property, the title to which resided in the administrator, and it was complete without confirmation by the court. The demurrer was well taken, and should have been sustained.

The judgment must be reversed and the cause remanded.

Moses v. The State.

Indictment for setting up or being Concerned in carrying on a Lottery.

1. *Grand jury; what will not invalidate findings of.*—The findings of a grand jury are not invalidated, because the record of its organization does not show that it was ascertained whether any of the grand jurors had, during the preceding twelve months, served as grand or petit jurors.

2. *Accomplice; when conviction may be had on uncorroborated testimony of.*—Under our present statutes, a conviction for a felony can not be had on the uncorroborated testimony of an accomplice; but in misdemeanors the jury may convict on his uncorroborated evidence, if they credit him.

3. *Same.*—It is for the jury to determine, from the facts and circumstances of the case, how far the complicity of the witness in the offense affects his credibility in misdemeanors, and where the offense is mere *malum prohibitum*, a charge that the witness' complicity in it detracts "very materially" from his credibility, is erroneous and properly refused.

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APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The appellant Moses was indicted and convicted for setting up and carrying on a lottery, without the legislative authority.

One Murphy, who was indicted for a similar offense, growing out of the transaction for which Moses was indicted, was the only witness for the prosecution; the court having allowed a *nolle pros.* as to Murphy at the request of the State. This witness testified as to the manner in which Moses had carried on the lottery during the twelve months preceding the indictment, and that he, witness, was engaged several months with defendant in carrying on the business, which was fairly and honestly conducted. This was all the evidence.

The court charged the jury that they were "exclusive judges of the evidence, but as the defendant has set up that the only witness in this case is an accomplice, the court tells you that you may look to that fact in arriving at the conclusion whether he is to be believed or not; and on that subject, further charges you, if you believe, beyond a reasonable doubt, that Murphy has told the truth, then you should give his evidence the same weight as though he had not been an accomplice." The defendant excepted to this charge, and requested the court, in writing, to charge the jury as follows: "The fact that the witness is, or was, an accomplice, detracts very materially from his credit." The court refused to give this charge, and the defendant excepted. The defendant further requested the court, in writing, to charge the jury, "if the alleged business was conducted honestly and fairly, the jury may consider that fact in ascertaining whether or not the case is made out beyond a reasonable doubt." This charge was refused, and the defendant excepted.

The record, showing the organization of the grand jury, &c., is, in all respects, regular, but is silent as to whether the court ascertained if any of its members had, during the preceding twelve months, served as grand or petit jurors.

The refusal to charge as requested, the charge given, and failure of the record to show proper qualification of the grand jurors, are now assigned for error.

MCKINSTRY & SON, for appellant.—The record showing the organization of the grand jury, fails to state that the court ascertained whether the grand jurors have served within the past twelve months as required by statute. An accomplice may be a witness, but the judge should caution the jury not to convict on his uncorroborated testimony.

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"This has so long been the practice, that the failure to give the jury such advice, would be regarded as an omission of duty on the part of the judge.—1 Greenleaf Ev. § 380; 1 Phillips Ev. 30-32; 2 Starkie on Ev. 12. Lord Ellenborough says the rule applies as well in misdemeanors as in felonies.—31 Howell State Trials, 326; 26 Ala. 24. The charge given, and the refusal to charge as requested, are shown to be erroneous by these authorities.

JOHN W. A. SANFORD, Attorney-General, *contra*.—In misdemeanors the accused may be convicted on the uncorroborated testimony of an accomplice—*Hart v. The State*, 40 Ala. 32; *Alsabrook v. The State*, 52 Ala. 26. There is nothing in the objection as to the formation of the grand jury.—R. C. § 4187.

BRICKELL, C. J.—The record does not disclose that the City Court, before organizing and charging the grand jury, ascertained whether any of its members had, during the preceding twelve months, served as grand or petit jurors, as required by the statute.—Pamph. Acts, 1874-5, p. 186. This was a duty the statute imposes, but if the intendant, from the recitals of the record, be, as is urged by appellant's counsel, that the duty was not performed, the findings of the grand jury, as organized, are not thereby affected. The statute expressly declares, that if a grand jury is drawn in the presence of the officers designated by law, no objection to its formation, nor to the legal qualifications of any of its members, shall be entertained after its organization.—R. C. § 4187.

It is a settled rule at common law, that an accomplice is a competent witness for the State, and that a conviction may be had upon his testimony. The degree of credit to which he is entitled, lies exclusively in the province of the jury, though, in prosecutions for felony, the judges, in their discretion, will advise against a conviction on his uncorroborated evidence.—1 Green. Ev. §§ 379-80. The Code of 1852 provided that, "a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely show the commission of the offense or the circumstances thereof." This provision was construed as extending alike to misdemeanors and felonies.—*Davidson v. State*, 33 Ala. 350; *English v. State*, 35 Ala. 428; *Bird v. State*, 36 Ala. 279; *Smith v. State*, 37 Ala. 472; *Bass v. State*, *ib.* 469. This construction led to a change of the statute,

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limiting it in operation to felonies.—R. C. § 4193. The result of this legislation is, that in felonies a conviction can not be had on the testimony of an accomplice, without corroboration connecting the defendant with the commission of the offense. In misdemeanors, a conviction may be had on his evidence, without corroboration, if the jury credit him. His complicity goes only to his credibility, and of that the jury must judge, as they judge the credibility of other witnesses. The instructions given to the jury, seem to us, to state the law correctly. The instruction requested would have invaded the province of the jury. It was for them to determine, from all the facts of the case, how far the witness' complicity in the offense, affected his credit. From the character of the offense, not involving moral turpitude, merely *malum probitum*, and from the nature of his connection with it, the jury may not have supposed there was any good reason to discredit him. The law does not pronounce that without regard to these facts, his complicity affects his credit *very materially*.

Let the judgment be affirmed.

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Action against Sureties on Administration Bond for Devastavit committed by Principal.

1. *Legislative enactments and proceedings in the courts of the State during the war; validity of.*—Legislative enactments, and proceedings in the courts of this State, while it adhered to the Confederate States, for the preservation of order, the protection of property, the enforcement of contracts, and in the general administration of civil government, and not with the purpose of aiding the war then raging between the United States and the Confederate States, are valid and binding in all respects.

2. *Overthrow of the Confederacy; effect of, on States giving allegiance to.*—What was the status of States adhering to the Confederate States, after its overthrow by the United States, and what were the consequences resulting therefrom; whether it left the resisting States subject to the will of the United States, as conquered foreign States would have been, or whether they remained States to be dealt with by the conquering power under the limitations of the Constitution; and what those limitations required in the rehabilitation of the States, are political questions which cannot be determined by the courts of a State, which, together with all of its officers, hold power derivatively, from measures devised by the United States for the re-admission of the States within the Union, acquiesced in by the people of the State, and recognized by the Federal government. The practical question, when such matters are brought before the courts, is, not what the conquering power might or should have done, but what it actually did.

3. *Conquest; effect of, on laws of conquered.*—A conquest of itself, does not
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overthrow municipal regulations, or civil authority; it only confers authority to do so, and, until this is done, both continue.

4. *Proclamation of Gov. Parsons; effect of.*—When the President of the United States, by proclamation, appointed Gov. Parsons to reorganize the civil government of the State, that officer, representing the conquering power, did not abrogate the prior statutes, vacate all its offices, and create new officers, or make any new rules for the protection of life, liberty, or property; but adopted and enforced its laws as he found them, save such as were rendered inapplicable by the results of the war. He retained, by name, nearly all the minor offices essential to the proper conduct of the government, and convenience of the people—a class to which the general administrator of Mobile belonged—and expressed a desire to fill other offices vacated, specially named, and did not include the county administrator of Mobile; and hence that office, if it be conceded that it is an office, remained undisturbed, and continued under that government as it did before.

5. *Reconstruction acts; effect of.*—The fact that the Parsons provisional government, and the State government succeeding it, were afterwards treated as illegal, and overthrown by Congressional act, could not and did not annul lawful acts done by officers of such government prior to that time; and the reconstruction acts did not abrogate the existing State government, but declared that it should be provisional only until the State was admitted to representation in Congress.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. HENRY T. TOULMIN.

This was an action brought by the appellee, George W. Buckley, who was a distributee of the estate of W. W. Buckley, deceased, against the appellants, who were sureties on the bond of Wesley W. McGuire, as the general administrator of Mobile county, to recover for an alleged devastavit by said McGuire in the administration of the estate of said Buckley.

The complaint set out the bond, which was approved by George W. Bond, as probate judge of Mobile county, on the 7th day of March, 1864; averred that McGuire, after giving the bond, qualified as general administrator under it, and that as such administrator, under and by virtue of letters issued to him by the probate court of Mobile county, on the 21st day of September, 1865, he came into possession of a large amount of property belonging to the estate of William W. Buckley, who died in the summer or fall of 1865; that he had wasted and misapplied the assets; that in obedience to a citation issued by the probate court, in May, 1874, McGuire had appeared and made a settlement of his administration; that on such settlement a decree was rendered against him, in favor of the plaintiff, for the amount claimed; that execution against him, issued in this decree, had been returned “no property,” and that the bond had been thereby forfeited, and the defendants had become liable for the devastavit committed by McGuire.

The defendants filed four pleas, the first denying that McGuire had failed to faithfully administer all estates which came

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into his hands ; averring that at the time of the issuance to him of letters on the estate of Buckley, he had ceased to be general administrator. The second plea averred that at the time of the execution of the bond sued on, the State of Alabama was one of the Confederate States, and at open war with the United States, denying all its laws and jurisdiction, but governed by the laws of the Confederate States, and the laws of Alabama as one of the Confederate States ; that before the first of July, 1865, the government of the Confederate States, and also the government of the State of Alabama, as organized on the day of executing the bond, was conquered and subdued, and before the time specified, the government of the United States had taken entire dominion over the State of Alabama, and proceeded to establish civil government in the State. The plea averred that McGuire's office was thereby vacated, and the sureties on his bond discharged from liability for his acts after that time ; that Buckley did not die until September, 1865, and therefore they were not liable for the administration of that estate.

The third plea set up the existence of war at the time of the execution of the bond ; averred that the court of county commissioners, who recommended McGuire for appointment, and the court of probate of Mobile county, in which the bond was filed, were courts of and presided over by officers holding under the said government and State so hostile ; that McGuire and the then judge of the probate court which appointed him, were officers of said hostile government and State, giving allegiance thereto and to the Confederate States ; that McGuire was appointed to fill an office under said hostile government of Alabama, and of the Confederate States ; that thereafter, on the 29th of May, 1865, the hostile governments of Alabama, and of the Confederate States, were overthrown, and the people of said State deprived of civil government and were subjected to military rule by the United States ; that thereafter, on the 21st day of June, 1865, Andrew Johnson, President of the United States and commander-in-chief of its armies and navies, took control and possession of the State of Alabama, and ruled and governed the people thereof by the appointment, by proclamation, of one Lewis E. Parsons as governor, with full and absolute power to govern and control the people of the State, and to establish a government from a portion of the people who were styled loyal citizens of the United States ; that Parsons, by virtue of this appointment, did take control of and govern the people of the State, and by proclamation published on the 20th day of July, 1865, declared what laws should be in force and operation, and appointed numerous

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persons to various offices, subject to the appointing power; that after the office of McGuire, held by him under his appointment in 1864, had determined, by virtue of the premises, letters of administration on the estate of Buckley were issued to him by one Bond, who at that time claimed to be probate Judge of Mobile county, by virtue of an appointment to that office by Parsons, and of his qualification thereunder in pursuance to the terms of his proclamation; that the letters thus issued by Bond were the only letters ever issued to McGuire on the estate of Buckley. By reason of these facts the plea averred that McGuire did not take the letters as alleged in the complaint by virtue of his appointment in 1864, and denied the liability of the sureties on the bond then given for his acts done by virtue of these letters.

The fourth plea set up the existence of war; the overthrow of the Confederacy; the proclamation of the President declaring the State without civil government, and appointing Parsons provisional governor; the proclamation of Parsons organizing the provisional government; the appointment of Bond, as probate judge, by Parsons; the issuance of the letters on Buckley's estate to McGuire by Bond, while acting under his appointment by Parsons; averred that the provisional government thus established was the only government then existing in the State, and its officers the only persons claiming to be entitled to exercise any authority in the State; that McGuire's office, under his appointment in 1864, had expired and determined before the issuance of of these letters, and denied liability of the sureties on the bond then given, for his administration of Buckley's estate.

The statute of limitations for six years was also pleaded.

A demurrer to these pleas having been sustained by the court, the appellants, by leave, filed five additional pleas. The first of these pleas averred that the decree alleged to have been rendered by the probate court, against McGuire, as administrator of Buckley, was not a final decree, and did not entitle plaintiff to maintain this action. The second plea averred that McGuire was appointed administrator of Buckley on the 21st day of September, 1865, by the probate court of Mobile county; that on the 29th of September, 1865, the constitutional convention then in session, by its ordinance, vacated such grant, and that no assets of the estate of Buckley came into McGuire's hands before such letter were vacated. The third of these pleas set up the removal of McGuire from his office by the constitutional convention of 1868, and the legal appointment and due qualification of one Bromberg as his successor, on the 19th of February, 1869, and averred the right of Bromberg to compel a settlement

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of McGuire as such administrator, and failure by Bromberg for more than six years to do so, and pleaded the statute of limitations of six years in bar.

The fourth additional plea set up that McGuire was removed from his office, as general administrator, by ordinance of the Convention, on the 29th day of September, 1865; averred that none of the assets of Buckley's estate came into his hands prior to his removal, but that all the assets with which he was charged in the decree rendered against him in the probate court, came into his hands after his removal as aforesaid, and denied the liability of the sureties on the bond of 1864, for the administration of Buckley's estate.

The fifth additional plea averred that the appointment of McGuire as administrator, by Bond as probate judge, on the 21st September, 1865, was illegal, and without any lawful authority, because at that time Bond had not been appointed by Parsons or any other legal authority.

The plaintiff demurred to first four of these pleas, and the demurrer was sustained.

A replication was filed to the fifth plea, which set up Bond's election to the office of probate judge, in May, 1861, for a term of six years, and his qualification under that election; and averred that, at the time of the issuance of the letters to McGuire, he held his office under and by virtue of his election in 1861.

A rejoinder, which averred the overthrow of the Confederacy and the State government, and that by reason thereof all offices held under either were vacated, was demurred to, and the demurrer sustained.

On the trial, the letters to McGuire, and the transcript of the decree rendered against him in the probate court, were admitted in evidence against the objection and exception of the defendants.

The admission of this evidence, and the sustaining of the demurrer to the pleas, are now assigned as error.

E. S. DARGAN, R. H., R. I. & G. L. SMITH, J. LITTLE SMITH and GAYLORD B. CLARK, for appellants.—The liability of a surety is one of strict limitation, and he stands upon the letter of his bond.—5 Ala. 388; 15 Peters. The bond sued on was given after the ordinance of secession in 1861—after the State had expelled by force every vestige of power and authority of the United States and of the State of Alabama, which existed before the ordinance of secession; it was given after a bloody war had been commenced and carried on by Alabama, and other States in like position, associated together under an organization called the Confederate States

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government, and the bond was made payable to, and was taken and approved by, a judge of probate, who derived his power from the rebellious State of Alabama, and who held office under, and acted only under the laws of such hostile State. The bond, and the bond alone, constituted the contract which the securities entered into, and the obligation of it is to be determined by the meaning of all the parties to it. The parties to the bond were McGuire and his sureties on the one part, and on the other, the State, represented by Bond, probate judge, standing as *parens patriæ*, but as the parent of a country which had assumed and held an independent power over its people, and one hostile to the power and authority of the United States, taking care of its own citizens as such, and not as citizens of the United States. The faithful administration contemplated by both parties, was the faithful administration of such estates as might be committed to McGuire by the government which appointed him, so long as he continued to hold the office to which he was appointed by such authority. Such was the contract of the sureties.—*Van Epp v. Walsh*, 1 Woods, 606. Did they stipulate or contemplate that they would be bound for his acts when the office was held or claimed by him under a different government, under a different appointment, when in truth the term of the office for which they had bound themselves had completely expired even before the death of Buckley? The term for which they consented to bind themselves was under one government; that government was overthrown, completely extinguished. *Could an office under it, filled by its laws, survive the authority of the government?* In a country acquired by conquest or force of arms, the mere will of the conqueror is sufficient to change the laws.—17 Wen. 387; 1 Cowper, 209; 20 How. 176; 9 Wall. 129; 16 How. 164. The condition of Alabama, at the close of the war, was that of a conquered territory at the mercy of the conqueror. The authorities cited above, conclusively show the right of the conqueror to abolish the government of the conquered. Did he do so in this case? On the 21st June, 1863, Andrew Johnston, as president and commander-in-chief of the armies and navies of the conqueror, issued his proclamation, declaring that the rebellion had deprived the people of the State of Alabama of *all civil government*, and he appointed Lewis E. Parsons governor, clothing him with absolute power to do all he thought necessary to be done to restore the State to the control of that portion of her people which were loyal to the United States. This proclamation did two things. It first declared that Alabama had no civil government,—if she had no civil government she had no law, no officer, and no au-

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thority to make one. It declared that Parsons was the sole judge of what was necessary to be done. Parsons, on the 20th of July, 1865, issued his proclamation, in which he declared that, pursuant to the power vested in him by the President, he appointed certain persons to certain offices upon certain conditions; and declared his readiness to fill other offices when suitable persons could be found, and the loyal citizens of the State wished the offices filled. This shows conclusively that he who had the power to abolish, had chosen to abolish all the offices which he did not specifically fill, at least till he should see fit to fill them. The general administrator of Mobile county was an officer of the State, made so by statute, a part of the machinery of the civil government which the president declared had ceased to exist in Alabama. Buckley was alive when all this was done, and long before his estate was committed to McGuire, the office of general administrator for Mobile county had ceased to exist, and no liability can be imposed on the sureties, who only contracted to be responsible for his acts as general administrator under his then appointment. As to the authority of Parsons to abolish, and the effect of his proclamation, see *Union Bank v. Commercial Bank*, 22 Wallace.

GIBBONS & PRICE, *contra*.

NOTE BY REPORTER.—Appellee's brief did not come into the reporter's hands.

STONE, J.—In *Parks v. Coffey*, 52 Ala. 32, many of the questions raised by this record are considered, and necessarily decided. In that case we approved the rulings in several of the leading decisions of the Supreme Court of the United States, and, notably, the case of *Sprott v. United States*, 20 Wall. 459. The language which we heartily approve in the opinion in that case, defining as it does the legal effect of our recent civil revolution and its overthrow, is as follows: "The recognition of the existence, and the validity of the acts of the so-called Confederate government, and that of the States which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations. The latter, in most, if not in all instances, merely transferred the existing State organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized

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society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or false Federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when, in the use of these powers, substantial aid and comfort was given, or intended to be given, to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void." We say nothing, in this connection, of the terms, *rebellion* and *treason*, employed in the foregoing extract. Such is the verdict which history pronounces on unsuccessful revolution.

In *Horn v. Lockhart*, 17 Wall. 580, that court had said, "The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace."

Speaking of the late war, and its consequences on State officers, and the exercise by them of their accustomed functions, we, in *Parks v. Coffey*, *supra*, said: "Their tenure of office did not depend upon any Federal functionary. They could not be deposed, or their places supplied, by the action of any one from without the State. In fine, they composed a government, created by the people of Alabama, for the enactment and enforcement of the laws of the people; were responsible for their official acts only to this people; could be succeeded in office only by those whom this people should elect, and possessed, *de jure*, all the powers of government, except those which were denied to them by the constitution of Alabama and the constitution of the United States.

The rightful government, thus constituted and thus endowed with the powers and faculties of administration, which Alabama had before, and when the act of secession was passed, continued without change, except by the regular election or appointment of successors to the persons whose terms of office expired, down to the close of the war. If any of its members ceased to be lawful members of the government, while they acted as such, and became merely *de facto* members of it, or only *actual* members, they were then usurpers of seats of authority which belonged to others. Who were those others that were thus expelled or kept

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out? Who claimed to be so? Who, if the incumbents had vacated their offices, would have had the right, or claimed that they had the right, to take and occupy them? These are questions that cannot be answered, and why not? Because the incumbents of those offices were not usurpers of them, but rightfully in possession." This was our condition up to the moment of the surrender of the Confederate forces.

In the appointment of a general administrator and guardian for Mobile county; in committing to his care the administration of estates of decedents, and in providing for the safe custody of infants and their estates, the courts exercised functions among the most conservative that are known to civil jurisprudence. These functions can not be tortured into aid and comfort to the war, which this, with other States, were engaged in with the government of the United States.

It is contended, however, that when the Confederate revolution was overthrown, we lost our corporate existence and municipal organization, and were remitted to the common States of conquered territory. The last of these propositions may admit of serious debate. It may be, that in the language of Justice Miller, *supra*, we only sought "to transfer our existing State organization to the support of a new and different national head." It is difficult to understand how such attempted transfer could work a forfeiture of our corporate existence, and resolve us into unorganized elements. We had never ceased to be a State, and the results of the war proved we had never ceased to be a State in the Union. But even if our defeat placed us in the category of conquered alien territory, the result contended for did not follow. Conquest does not *ipso facto* supplant civil administration. It only arms the victor with the power to displace the precedent authority and to impose one of its own. It may tolerate and continue existing order—it may modify it—it may impose an entirely new system. Might makes right; but victory gives only a power to change. It does not effect the change, *proprio vigore*. "When the United States take possession of any rebel district, they acquire no new title, but merely vindicate that which previously existed, and are to do only what is necessary for that purpose."—Case of Amy Warwick, Law Rep. June, 1862. See, also, *Cross v. Harrison*, 16 How. 164.

Conquest of a foreign territory absolves political allegiance, and establishes new political relations. But, "The reasons for considering the former political laws as abrogated do not apply to the municipal laws, which regulate the private relations of individuals to each other, and their private

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rights of property. The change of sovereignty does not obliterate the subject matters of property or obligations, nor the parties to the rights, duties, or compacts; and, in respect to these things, there is a permanent necessity for an uninterrupted existence of laws of some kind. Accordingly, it is held that the municipal private code remains in force. Yet, it is not *proprio vigore*, or by the will of the people of the conquered country, but by the acquiescence of the new sovereignty, which is held to intend the continuance of such laws, in the absence of new laws displacing them."—Wheat. International Law by Dana, 4th Ed. § 346, note 4. Further on in the same note, the same author says, "the private laws of the former State subsist, unless they are suspended by the occupying power, and for the reason that some laws must exist, to regulate private rights and relations, and the persons and things, which are their subjects, remain unchanged: therefore, the laws are permitted to continue, until a change is expressly made."

We think it results from the principles stated above, that if the defeat of the Confederate arms had the same effect on the resisting States, as if they had been conquered foreign States, the consequences were: First, that it broke down and destroyed the attempt to establish a separate Southern Confederacy, and removed all obstacles to the maintenance of the authority of the Government of the United States, within those States: Second, that it clothed the government of the United States with the power to exert its supremacy and will, within constitutional limits, in the matter of rehabilitating such States; and that, in the exercise of this function, the conquering power could impose an entirely new municipal government upon the vanquished, or could leave them under their former municipal organization, either with or without modification: Third, that until a new system was imposed, or the old one modified, the former municipal regulations remained of force; and they were only supplanted to the extent that new laws and new regulations were established. We have supposed this civil status to have been ours, not for the purpose of conceding its truth. It is alike foreign to our intention, and to the wants of this case, to discuss that question. The restoration of the States that had been resisting, to their places in the Union, renders all discussion of the methods by which it was accomplished an immaterial legal inquiry. Power imposed the conditions; the vanquished had no option but to accept; they did accept the terms; and the present political status is the accomplished result. Political status is more a fact than a theory; and in our complex system of government, it depends on the

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fact of recognition, rather than the constitutionality of the methods by which it is brought about. It is a purely political question, and can never be carried before a court of *oyer and terminer*. If we could succeed in declaring unconstitutional and void, the steps by which we were recognized as States in the Union, the result would be to declare that Alabama is without civil officers; for all the officers of the State hold their commissions derivatively from the reconstruction measures devised by the government of the United States.

But the question for our solution is, not what the conquering power might, or should have done. What did it do?

On the 21st of June, 1865, the president of the United States issued his proclamation, appointing Lewis E. Parsons provisional governor of the State of Alabama, and empowered and instructed him to reorganize the civil government of the State, assuming as a reason for it, that "the rebellion which has been waged by a portion of the people of the United States against the properly constituted authorities of the government thereof, in the most violent and revolting form, but whose organized and armed forces have now been almost entirely overcome, has, in its revolutionary progress, deprived the people of the State of Alabama of all civil government." Broad as this language appears, it was not intended to affirm that the State of Alabama was in a state of anarchy, without any rules of civil conduct. It was not intended to declare that all statutes were repealed, and all offices thereby vacated. The utmost it intended to assert was, that the State of Alabama, in its municipal organization, was at the mercy of the conquering Federal government, and that he, the executive head, had the power to ordain new municipal regulations, and intended to exercise it. And such was the construction placed upon it by Governor Parsons. In his proclamation dated July 20th, 1865, he made known that he came not to tear down, but to build up; not to wound, but to heal. He did not declare all statutes abrogated, or all offices vacated. He proclaimed no new laws, and created no new offices. He made known no new rules for the protection of life, liberty, or property, and introduced no new official machinery for the preservation of these inalienable rights. He proposed to adopt and enforce the laws as he found them, save such as the results of the war had rendered inapplicable, and to retain the machinery which those laws had provided for their enforcement. And while he evidently asserted the right to declare offices vacated, he exercised that right sparingly. He retained in office, by name, justices of the peace, constables, members of the commissioners court (except judges of probate), the county treas-

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urers, tax-collectors and assessors, coroners, and municipal officers of incorporated cities and towns, who were in office on 22d May, 1865. And judges of probate and sheriffs, who were in office at that time, were retained in their respective offices, until others were appointed.

It is contended, however, that the general administrator and guardian of Mobile county was, under the statute of his creation, an officer; and, inasmuch as he is not named in the proclamation as one of the officers retained, this omission to name him vacated his office. We might concede that his is a *quasi* office, but it has none of the attributes of a municipal office. But suppose we concede it is an office. Governor Parsons, representing the conquering power, did not lay his hand upon it, or take any steps to vacate it. We have shown above that conquest does not *per se* overthrow municipal regulations, or civil authority. It only confers the power to do so. This particular office, or trust, was not interfered with, and therefore it continued. But we think the proclamation proves that Governor Parsons, if the subject occurred to him (of which we have doubts), intended to retain this officer, or fide-commissary, in the place in which he found him. We have shown above that he retained all the minor officers, whose services are brought into most frequent requisition. The well-being of society imperatively demanded this. Without these, order could not be preserved, marriages solemnized, or estates administered. Other offices of higher grade, were of less pressing use. These he expressed a willingness to fill, "if the loyal citizens of the State find it necessary to have them appointed." He names these officers—clerks of the Circuit Courts, solicitors, judges of the Circuit Courts, chancellors, and judges of the Supreme Court. It will thus be seen that Governor Parsons provided for and mentioned all the officers constituted and required in municipal administration. The most numerous classes—those whose services were and are most frequently required—he retained in office. Those, whose offices he concluded might be dispensed with for a time—possibly during his provisional administration—he expressed his readiness to fill, "if the loyal citizens of the State [should] find it necessary to have them appointed." We think Governor Parsons, in these named classes, intended to embrace all the officers of the State employed in municipal administration, and that he thought he had done so. We think, further, that he intended to continue, as he found them, the laws and the agents for their administration, to the end that all the rights of person, property, successions, personal relations, and police, as the same are enjoyed under our free constitutions, might not be

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interrupted or impaired. And, finally, we think, that when he announced his intention not then to appoint clerks of Circuit Courts, solicitors, judges of circuits, chancellors, and judges of the Supreme Court, his conclusion was that he had continued in operation all other official machinery, for the complete, harmonious administration of municipal government. Under these rules, neither the overthrow of the Confederacy, Governor Parsons' accession to power, nor any official action taken by him, disturbed the incumbency of the office of general administrator and guardian for Mobile county.

If it be contended that all the foregoing was done under the president's proclamation of 1865, and that the State governments thereby sought to be rehabilitated, were treated as illegal and overthrown by the congressional reconstruction of 1867, the answer is, first, that this did not, and could not annul what was done, permissively, if you please, in 1865, under the sanction or acquiescence of the provisional governor; second, the reconstruction act, itself, did not abrogate the State governments, or their machinery then in exercise, but only declared "that, until the people of said rebel States shall be by law admitted to representation in the congress of the United States, any civil government which may exist therein shall be deemed provisional only."

Much contrariety of opinion may be entertained and expressed by publicists as to the regularity of each of the plans of reconstruction through which we have passed. It is neither our purpose nor province to enter upon the discussion. It is a political question which cannot come before us. The result of the first, temporarily, and of the last up to the present time, has been, in each case, an accomplished fact. We must deal with it as it was and is, not as we may believe it should have been.—See *Plowman v. Thornton*, 52 Ala. 559, 556.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

MANNING, J., not sitting.

[Drake v. Stone et al.]

Drake v. Stone et al.

Bill in Equity to determine who were Beneficiaries under Policy of Life Insurance, and to subject amount due on Policy to Debts of Assured.

1. *Policy of life assurance; construed.*—An ordinary life policy, payable on the death of the assured, in consideration of the annual premiums paid and to be paid by the assured while in life, for the benefit of the assured's wife and his children by her, bound the insurance company to pay the sum insured, upon the death of the party assured during the existence of the policy, "to the above named parties, to whose benefit this insurance shall enure, whenever the same becomes due, their executors, administrators, &c." When the policy was delivered, assured's wife was living and had several children by her marriage with him. Between the delivery of the policy and the death of the assured, the wife and some of the children died. *Held:*

1. The wife and all her children by the assured, who were in life when the policy was taken out, or their personal representatives, are entitled to share in the insurance.

2. What would be the rights of a child of the assured, born after the delivery of the policy, is not decided.

3. Under an ordinary life policy an interest vests in the person for whose benefit it is taken out, when the policy is delivered, subject to be divested or forfeited on non-payment of the premium, as the policy may prescribe; and on the death of the beneficiary, either before or after the death of the assured, the insurance money goes by bequest or succession, as other personal assets of the beneficiary.

APPEAL from Chancery Court of Mobile.

Heard before Hon. HURIOSCO AUSTILL.

The original bill in this cause was filed on the 28th day of October, 1873, by John H. Stone, Joseph R. Edwards, executor of William J. Matthews, and J. L. Pringle, who were creditors of William B. Drake, against The Knickerbocker Life Insurance Company, The Continental Life Insurance Company, Charles E. Waller, administrator of the estates of William B. and Catherine G. Drake, deceased, William H. Drake, Mary L. French, Alpheus C. French, Samuel C. Sheppard, James E. Webb, administrator of the estate of Lucy T. Sheppard, deceased, William C. Garrett, administrator of the estate of Alpheus B. Drake, deceased, adults; Ida B. Casey, William Walton Drake and William Lanier, minors; and sought to subject the amount due on policies issued by the two insurance companies on the life of W. B. Drake to the claims of complainants as his creditors.

The case made by the bill, so far as necessary to the decision in this case was this: In 1868 the Knickerbocker Life

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Insurance Company executed and delivered to William B. Drake, a policy of assurance on his life. Catherine G. was the wife of William B., and was living when the policy of assurance was delivered, but died before her husband. At the date of the delivery of said policy, said Wm. B. and Catherine G. had the following children living: Alpheus B. Drake, who died before either his father or mother, Lucy T. Shepard, who also died before either of her parents, Mary L. French and William H. Drake, who are still living. The policy of assurance recites that "The Knickerbocker Life Insurance Company, in consideration of the premium of five hundred and seventy-eight dollars and forty cents to them in hand paid by William B. Drake, and of the annual premium of a like sum to be paid on or before the twenty-first day of November, at noon, in each year during the continuance of this policy, do assure the life of William B. Drake, of Hale county, in the State of Alabama, in the amount of ten thousand dollars, for the term of his natural life, for the benefit of his wife, Catherine G. Drake, and her children by the assured. And the said company do hereby promise and agree well and truly to pay, or cause to be paid, at their office, the said sum insured to the above named parties, to whose benefit this insurance shall enure, whenever the same becomes due, their executors, administrators or assigns, within three months after due notice and satisfactory proof of the death of the party whose life is hereby insured, during the continuation and before the termination of this policy."

The insurance company having answered, admitting its liability under the policy, it was ordered to pay the money due thereon into court, and having done so was discharged. The claims of complainants, as creditors of the assured, were adjusted, and the chancellor thereupon decreed that under this policy, Catherine G. Drake, the wife of the assured, and her children by him, living at the time of the delivery of the policy, took an equal interest in the same; that such interest vested in them at the date of the delivery, and was such an interest as passed to their legal representatives, and decreed distribution accordingly. From this decree this appeal is prosecuted by the appellant, William H. Drake, who is a child of William B. and Catherine G. Drake, living at the time of the death of the assured.

THOMAS R. ROULHAC, for appellant.—The contract of insurance is a contingent one, contingent between the insurer and insured, and therefore of necessity contingent as to every one else, and can not possibly confer any vested rights.—See 50 Mo. 49; 12 Wis. 233; 23 Wis. 113. One thing is certain,

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that whatever may be the nature of the contract, it is not intended as a bounty from the insured to the beneficiaries, and if this is to furnish any criterion to the construction of it, it would seem equally certain that the insured did not intend to give bounty to strangers or even to creditors of children. See 28 N. J. Eq. 167; 28 La. An. 137; Ib. 938; 4 Vroom. 488; 100 Mass. 503; 23 N. Y. 521; 44 N. Y. 281; 12 East. 183; 59 N. Y. 587; 37 Maine, 350; 34 Conn. 305. All these decisions show conclusively that the beneficiaries acquire no vested interest, under the policy, before the death of the assured.

JAMES E. WEBB, and CHAS. E. WALLER, *contra*.—The contract of insurance was complete on the delivery of the policy, and creates in the beneficiaries vested interests, subject to be defeated by the non-payment of premiums in the future; and this vested interest passes to their legal representatives in case of their death before the death of the assured. The interest vested in them can not be defeated, except by the failure to do some thing which the contract of insurance itself expressly stipulates shall work a forfeiture of the policy.—See 3 Otto, 30; 19 Am. Rep. 530; 7 Metcalf, 363; 40 Conn. 343; 26 N. Y. 9; 5 Metcalf, 328; 2 Phil. Ch. 535; May on Ins. 477, § 392; Bliss on Life Ins. 528, 530, 534, 535.

STONE, J.—The Knickerbocker Life Insurance Company of New York assured the life of Wm. B. Drake, in an ordinary life policy of ten thousand dollars, payable after his death. The annual premium, paid and to be paid by Wm. B. Drake, was five hundred and seventy-eight 40-100 dollars, to be paid annually on a given day during the life of said Wm. B. Drake, and the policy affirms, in its face, that it is "for the benefit of his [said W. B. Drake's] wife, Catherine G. Drake, and her children by the assured." The policy recites that the premiums were to be paid by Wm. B. Drake, and contains the following clause: "And the said company do hereby promise and agree well and truly to pay, or cause to be paid, at their office, the said sum insured to the above named parties, to whose benefit this insurance shall inure, whenever the same becomes due, their executors, administrators or assigns, within three months after due notice and satisfactory proof of the death of the said party whose life is hereby insured, during the continuance and before the termination of this policy." There are no clauses or terms in the policy which give any other or different direction to the sum assured, or which vary the manner of the payment of the death loss. At the time the policy was issued and delivered, Mrs. Cath-

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arine G. Drake was living, and she had then in life several children, offspring of the assured. Between that time and the death of Wm. B. Drake, Mrs. Catharine G. Drake and some of the said children died. The question presented for our decision is, whether the money paid on this death loss is to be divided only between the children who survived Wm. B. and Catharine G. Drake, one or both, (it matters not which event, in this case; for no child died between the respective deaths of their parents;) or whether the widow and all the children who were in life when the policy was taken out, or their legal representatives, are to share in it. The chancellor, by his decree, affirmed the latter of these alternate propositions, and held that the personal representatives of Mrs. Drake, and of the children who died between the time of the delivery of the policy and the death of Mr. Drake, took equally with the surviving children. The question then is, whether the interests of the beneficiaries attached, and became what is called vested at the delivery of the policy, or, whether it was contingent, until the death of the assured *during the continued vitality of the policy*.

Life insurance, as an investment, or, as an economic enterprise, has increased vastly during the last score of years. It can not be classed with any other established or known adventure, and hence much contrariety of opinion obtains as to its true designation. By some it is claimed that, like fire insurance, it is a contract for a year, with a superadded agreement for renewal from year to year, at the pleasure of the person by whom the policy is taken out. And, based on this theory, it is contended that the receipt of the ultimate death loss depends on a contingency which may never happen; and, hence, the sum to be paid at the death has no such value, as that it may be the subject of a vested interest, but is like an estate dependent on a contingency that may never happen. We think it partakes somewhat of the qualities of a saving investment, but there are some differences. In *Piedmont & Arlington Life Insurance Co. v. Young*, at the present term, we said: "Its tendency is to equalize and adjust the burden of domestic sustentation, so as to provide for the families of the short lived, at the expense of those who live longer. The annual premiums paid by the assured, are graduated by the average length of human life; so that the families of those who are cut down before they reach the average age, share in the surplus paid in by those who are spared beyond that period."

In *N. Y. Life Ins. Co. v. Statham*, 3 Otto, 24-30, the Supreme Court of the United States decided "that the contract [of life insurance] is not an assurance for a single year, with

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a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or, in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. . . . The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same as when he is old and decrepit. . . . The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable per centage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance." The whole court was unanimous, apparently, on the principles announced above, except Mr. Justice Strong dissenting.

It is said in *May on Life Insurance*, § 392, that where the policy was for the sole benefit of children, the father could not devise the proceeds to his executors in trust for other purposes. The children in such case became vested immediately upon the delivery of the policy with the entire beneficial interest, and it is then beyond the control of the insured." Such cases are said to "proceed upon the ground that when the policy is issued the rights are vested, and can not be divested without the consent of those to whom they are secured." So, in *Bliss on Life Insurance*, § 316, it is said, "if the policy, when issued, expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premiums, and procured the insurance.—See, also, §§ 333, 338, 339.

In *Continental Life Insurance Co. v. Palmer*, 42 Conn. 60, a wife had insured the life of her husband, the amount payable to herself, if living, if not to their children. She died before her husband, and one of the children died before him, leaving a child. It was "held, that a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its

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parent, and was entitled to the portion of the fund which the parent would have received, if living."—See, also, *Chapin v. Fellows*, 36 Conn. 132; *Keller v. Gaylor*, 40 Conn. 343; *Conn. Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305. The same doctrine is asserted in *Hutson v. Menifield*, 51 Ind. 24; *Mut. Protection Ins. Co. v. Hamilton*, 5 Sneed, (Tenn.) 269. See, also, *N. Y. Life Ins. Co. v. Flack*, 3 Md. 341; *Swan v. Snow*, 11 Allen, 224; *Barry v. Equitable Life Assurance Soc.* 59 N. Y. 589; *Libby v. Libby*, 37 Maine, 359.

A few courts hold the contrary of these views, but we decline to follow them.—See *Gambis v. Con. Mut. Life Ins. Co.* 50 Mo. 44; *Clark v. Durand*, 12 Wis. 223; *Kernan v. Howard*, 23 Wis. 108.

We hold that under an ordinary life policy, an interest vests in the person for whose benefit it is taken out when the policy is delivered, subject to be divested or forfeited upon non-payment of the premium, as the policy may prescribe; and that on the death of the beneficiary, either before or after the death of the assured, the fund arising therefrom goes by bequest or by succession, as other personal assets of the beneficiary. We concur with the chancellor in his views, and hold that Mrs. Drake and her children by the assured, living at the time the policy was delivered, share equally as beneficiaries. Whether, if there had been children of the marriage born after the delivery of the policy, such children would have shared in the benefits, we need not inquire. The present record does not raise that question.

In the case of *Continental Life Ins. Co. v. Webb*, 54 Ala. 688, the language of the policy was entirely different from that found in the policy we are construing. And, in that case, much importance was attached to the fact, manifest in that policy, that the contracting parties referred, and intended to conform, to our statutes on the subject. The Knickerbocker Life Insurance policy contains no reference whatever to the statute, and makes no discrimination in the beneficial rights it secures, between the wife and children. We think that case does not conflict with this.

Decree of the chancellor affirmed.

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109 589*Attachment for Tort.*

1. *Attachment; for what will lie.*—Any civil action, whether founded on contract or in tort—as for an assault and battery—may, under our statutes, be commenced by attachment.

2. *Same; when properly issued against all of several defendants.*—Where an action of trespass against several defendants is commenced by attachment, and the affidavit discloses a ground of attachment as to all of them, the writ is properly issued against all.

3. *Same; how levied.*—When an attachment is sued out against several persons, it may be levied on the joint property of all the defendants, or on the separate property of one or more; but a levy on separate property only operates to bring in those defendants who have an interest in it, unless they voluntarily appear.

4. *Same; effect of, on exempt property.*—The levy of an attachment on personalty which is exempt, can not affect the defendant's exemption, but the levy, although it be released on that account, will bring the defendant before the court.

5. *Attachment bond; what not ground of objection to.*—An attachment bond is properly made payable to the defendants jointly, although the writ may be levied on the individual property of one only; and the addition of the word agent to the name of one of the obligors, in affixing his signature, does not affect its validity.

6. *Affidavit for attachment for tort; what defect in, not pleadable in abatement.*—The special affidavit required by statute, as to the particular facts and circumstances of the claim, where an attachment is sued out to recover damages, is intended for the single purpose of enabling the officer granting the writ to determine the amount for which a levy must be made, and its sufficiency can not be tested by plea in abatement.

APPEAL from Circuit Court of Baldwin.

Tried before H. T. TOULMIN.

Wesley Bryars, a minor, by his next friend, Elizabeth Bryars, commenced suit by attachment against James Hadley, Sr., and others, to recover damages for an assault and battery committed by them on him. The affidavit states that "James Hadley, Sr., James Hadley, Jr., Jesse Hadley, Thomas Stewart and Howell Pincher, are indebted to Wesley Bryars, in damages for assault and battery on him, the said Wesley, in the sum of ten thousand dollars," &c.

The attachment bond was in the penalty of twenty thousand dollars, and made payable to all of the defendants, and one of the obligors signed the word "agent" after his name. The circuit judge having approved this bond, issued a writ of attachment, which, after reciting the making of the affidavit and the giving of the bond, directed the sheriff "to attach so much of the estate of said James Hadley, Sr.

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James Hadley, Jr., Jesse Hadley, Thomas Stewart, and Howell Pincher, as will be sufficient to satisfy said debt and costs," &c.

The sheriff made a return that he had levied the attachment on certain property, as the property of the individual defendants named, and "also on five hundred head of sheep, as the property of said defendants, each claiming a part of same, and same so levied on," &c. Most of this property was claimed by the various defendants as exempt, and the sheriff allowed the claims and restored possession to them. The defendants, after craving *oyer* of the affidavit, bond, and writ of attachment, pleaded in abatement, in substance, that the attachment was not authorized by law; secondly, that the attachment could not issue against the defendants jointly; thirdly, that the defendants have not a joint interest in the property levied on. The court sustained a demurrer to this plea. James Hadley pleaded separately, that the property levied on was exempt to him under the Constitution and laws of Alabama, and that it had been so recognized by the sheriff, who had turned it over to him before the return day of the attachment, wherefore "he says that the levy and issue of said attachment, as to him, should be quashed and he be discharged from all further prosecution." The court sustained a demurrer to this plea, also.

The defendants moved to quash the attachment bond, among other grounds, "because it is signed by W. J. Bryars as agent, and it is not shown for whom he is agent, or his power to bind any one as agent, and his name does not appear in the body of the bond." This motion was overruled.

A motion was also made to quash the writ, &c., because of the insufficiency of the affidavit, it not averring sufficient facts to justify the judicial officer, who issues the attachment, in fixing the amount for which the levy shall be made, and such levy had been ordered for an amount fixed arbitrarily by the judicial officer." This motion was overruled.

The defendants excepted to the overruling of their various motions, and to the ruling of the court in sustaining demurrers to the pleas in abatement, and appeal by consent, under § 3486 of the Code, and here assign the same for error.

D. C. ANDERSON, and ALEX. MCKINSTRY, for appellants.

THOS. H. PRICE, *contra*.

BRICKELL, C. J.—The appeal is taken by consent of the appellee, under the statute (R. C. § 3486) which authorizes

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an appeal from a judgment overruling a motion to quash or dismiss an attachment, or sustaining a demurrer to a plea in abatement of an attachment. We pass over the defects of each plea in abatement, which an amendment could cure, as we find from the record, there is another case pending, involving the same pleas, and the same motions to quash, awaiting the decision in this cause. The first plea in abatement, alleges three separate grounds for quashing the attachment: the *first* of which is, that its issue is not authorized by law. The attachment is sued out for damages for an injury to the person of the plaintiff, committed by the defendants; and we presume the plea intends to assert, that an attachment may not issue for such a cause of action. If that be so, the objection is not well founded. Any civil action, whether founded on contract, or in tort, may, under the statute, be commenced by attachment.—R. C. § 2927. The *second* ground is, that the attachment could not issue against the defendants jointly. Trespassers may be jointly or severally sued, at the election of the party injured. When jointly sued, as in the present case, and an attachment is the leading process, issuing on an affidavit that discloses a ground of attachment as to all the defendants, it is properly issued against the defendants jointly—that is, it is proper to embrace all the defendants in one writ. The *third* ground is, that the defendants have not a joint interest in the property, on which the attachment is levied. We do not suppose a plea in abatement is the proper mode of testing the regularity of the levy of an attachment, or, of ascertaining the ownership of the property on which the levy is made. We pass that over, however. When an attachment issues against several defendants, it may be levied on the property of either defendant, in which he has an interest subject to levy, or on the joint property of all the defendants. The writ is joint and several in its operation—not confined to the joint property of the defendants. Of course, if it is levied on the separate property of one or more defendants only, it operates to bring before the court only the defendants whose property may be levied on, and not other defendants, having no interest in the property. The levy stands in the place of personal service of process, and if there is no levy on the property of one defendant, he is without the jurisdiction of the court, unless he voluntarily appears, as he would be without personal service, if the process were ordinary, issuing against the person, and not the estate.

The second plea in abatement is filed by the defendant, James Hadley, alone, and avers the property levied on is exempt from levy and sale. Property, which the Constitution

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and statutes exempt from levy and sale, is as free from seizure under attachment, as it is from process which authorizes a sale. When the property is personal, it must be selected and claimed, to draw it within the protection of the Constitution and statutes; and the selection and claim cannot be made until after the levy. The levy operated to bring the defendant before the court, though he may, by the subsequent claim, withdraw the property from the custody of the law, and retain undisturbed possession of it.

We do not find the bond defective. It is properly payable to all the defendants; such is the requisition of the statute. The fact that they are defendants, creates all the privity and community of interest, necessary to support it as a joint obligation to all, though the writ may be levied on the property of one only. It is not insufficient because one of the obligors affixes the word *agent* to his signature.

The motion to quash, presents, in addition to the matters we have considered, the sufficiency of the affidavit. It is supposed to be insufficient, because it does not aver the facts and circumstances attending the tort, so that the officer issuing the writ could fix the amount for which a levy should be made. In *Bozeman v. Rose*, 40 Ala. 212, it was held, that the special affidavit, of facts and circumstances pertaining to the particular transaction, which is required, when the attachment is sued out to enforce a claim for unliquidated damages, arising from breach of contract, is intended for the single purpose of guiding the discretion of the officer issuing the writ, in fixing the amount for which a levy may be made, and that its sufficiency could not be tested by plea in abatement; that it was for the officer issuing the writ to determine its sufficiency, and his determination was conclusive. This is manifestly true, and is as true, when, as in the present case, the action is for a tort, sounding wholly in damages. The statute guards the defendant against an excessive levy, by clothing the court with a discretion, on his affidavit to reduce the amount, and release the levy to the extent of the reduction.

We believe we have considered the several grounds of objection relied on, to abate or quash the attachment. We concur with the Circuit Court in the opinion that they are not well taken, and affirm the judgment it has rendered.

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Ellerbe, Adm'r, v. Troy, Adm'r.

Action on Promissory Note.

1. *Plea in abatement; what demurrable.*—An unverified plea in abatement of plaintiff's action, averring a judgment in favor of defendant, in the same court, upon the same cause of action, between the same parties, and the pendency of the cause in the Supreme Court undetermined, on appeal of plaintiff in that suit, at the time the action was commenced; and showing that the former suit was between plaintiff's guardian for her use and defendant, is demurrable, because of inconsistency and want of a verification.

2. *Plea; what demurrable.*—It is no answer to a suit brought by the intestate, and prosecuted afterwards by her administrator, to recover the amount due on a promissory note which had matured, and the interest on which was payable annually—that the intestate was entitled only to a life estate therein, and to the interest accruing thereon during her life; such plea admits a right of action in plaintiff when the suit was brought, and a right to recover interest; and as the note was past due, she could not split her cause of action for interest, and was entitled to recover both principal and interest.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

Frances Hunter, appellant's intestate, brought this action on the 11th day of April, 1871, against Catherine B. Ellerbe, as administratrix of A. W. Ellerbe, to recover the amount due upon a promissory note made by him and others on the 9th day of June, 1856, "payable three years after date, to executors of William Hunter, deceased, with interest payable annually on the 1st day of January," which note was averred to be the property of plaintiff.

The defendant pleaded, that "at the Spring term, 1867, of the Circuit Court, prior to the commencement of this suit, said Frances Hunter, by her guardian, Daniel S. Troy, who sued for the use of said Frances Hunter, impleaded said defendant as administrator aforesaid, upon the very same identical promises and undertakings in said complaint in this present suit mentioned, as by the record of proceedings thereof remaining in this honorable court, more fully appears. And said administratrix as aforesaid, further saith that the parties in this suit and said former suit, are the same, and not other and different persons, and that the said former suit so brought and prosecuted against this defendant as administratrix as aforesaid, by the said Daniel S. Troy, as guardian of the said Frances Hunter, for the use of said Frances Hunter, was, at the Fall term, 1870, of this honorable court, tried and adjudicated, and a judgment was

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then and there rendered therein by this court, in favor of defendant against the said plaintiff, who thereupon appealed from said judgment of this court to the Supreme Court of Alabama, and suit was at the time said summons and complaint in this suit were sued out, still depending, undetermined on said appeal in said Supreme Court, and this she is ready to verify, wherefore she prays judgment of said summons and complaint and that the same may be quashed."

Afterwards the death of the plaintiff was suggested, suit was revived in the name of the appellee, Troy, as her administrator, and he demurred to the plea on the following grounds: 1st. The plea is not sworn to or verified by any affidavit; 2d. The plea is inconsistent, alleging the parties to the two actions to be the same, yet showing the former suit was brought by Troy, as guardian, for the use of said Frances Hunter; 3d. Because it appears that said former suit was decided in this court before this suit was commenced." The court sustained this demurrer, and the defendant then pleaded seven other pleas, among them the following: 1. "That said Frances Hunter owned but a life estate in the promissory note sued on, and the said sum of money in the complaint mentioned, and that since the commencement of this suit, to-wit: on the — day of —, 1873, the said Frances Hunter departed this life, and that upon her death, her right to the said promissory note and said sum of money therein mentioned ceased and determined, and that said D. S. Troy, as administrator as aforesaid, has neither the legal title nor is he the party really interested in the promissory note and said sum of money therein mentioned." One J. L. Evans, the agent of the defendant, made affidavit "that upon advice, information and belief, the matters and things stated in the foregoing plea are true."

This plea was demurred to, because "it admits that said Frances Hunter was owner of the note when this suit was commenced;" because "it appears from the plea that said Frances Hunter was the party really interested in the note when suit was commenced;" because it appears from said plea, that this suit was properly commenced in the name of said Frances Hunter.

The defendant also filed another plea as follows: "6. That said Frances Hunter, at the time of the commencement of this suit, owned and was entitled to a life interest in the promissory note in the complaint mentioned, and was only entitled in her own right to the interest which may accrue thereon during her life time, and that at the time of her death, the debt in said note mentioned, became the property of the

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heirs at law of William Hunter, deceased," whom the plea goes on to name.

7th. That the right of said Frances Hunter to recover the principal or corpus of the note sued on, terminated at her death.

These two pleas were verified by J. L. Evans, who made oath that he was agent of the administratrix, and that he is "informed and believes the allegations in the foregoing pleas are true in substance and in fact." These pleas were also demurred to, on the grounds that they showed that said Frances Hunter was the party really interested in the note sued on, when the suit commenced; and that it was properly commenced in her name; and also because the pleas were not properly verified.

The court sustained a demurrer to each of these pleas, and the trial proceeded on issue joined on plea of non-assumpsit and other pleas not necessary to be noticed.

The plaintiff introduced the note, proved that it had been assets of the estate of William Hunter, deceased, but that his estate had been finally settled and distributed before the commencement of the suit, and that plaintiff received the note as part of her distributive share of the estate, under the will of said Hunter, who was her father.

The defendant, after proving that the will was duly admitted to probate, offered in evidence a duly authenticated copy, containing the provisions hereinafter copied, "for the purpose of showing that said Frances Hunter had but a life estate in the promissory note, and upon her death her rights ceased. The clause thus relied on, was as follows: "All the rest of my estate, both real and personal, I give and bequeath to my *two* children, to their sole and separate use, free from the debts or contracts of any husband they may hereafter have, on these conditions: The property to be kept together and held in common until one of them becomes of full age or marries. In case of the death of either of my children without children or descendants of children living, the whole of this bequest survives to the other; and if both of them die without children or descendants of children then living, then this property is to go to my heirs at law—they having a life estate with remainder to their children or grand children, and in case of their dying without children or grand children, then remainder to my heirs at law." On objection of the plaintiff, the court refused to allow the will to be read in evidence, and defendant excepted. It was shown that Ann Hunter, sister of said Frances, died without issue before said estate was settled, or distributed, and that said William

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Hunter left surviving him other heirs at law, who are still living, but no other children."

Verdict and judgment having been rendered against the defendant, she appealed, and now assigns for error that the court erred in sustaining the demurrer to the pleas, and in rejecting evidence of the provisions of the will of William Hunter.

WILLIAM M. BROOKS, for appellant.

PETTUS, DAWSON & TILLMAN, *contra*.

MANNING, J.—The first plea demurred to in this cause, set up the pendency of the former action upon appeal, in this court, and was obnoxious to the objections taken to it in the demurrer, of being inconsistent in its averments, and of not being verified, as a plea in abatement, by affidavit. The demurrer was properly sustained.

The cause of action was a promissory note made by appellant's intestate, among others, in June, 1856, payable three years after date, with interest from date payable annually. And the payee having died, it came, upon distribution of his estate, to his daughter, Frances Hunter, who brought this suit and was the original plaintiff therein. Upon her death appellee, Troy, prosecuted the suit as her administrator. The pleas, that his intestate was entitled to only a life estate therein, and to the enjoyment of the interest, merely, upon the principal sum, for her own use, were not an answer to the complaint. They admitted a right of action in Frances or Fanny Hunter, when the suit was brought. She was undoubtedly entitled to the interest for her own use, and could recover it only by a suit upon the note. And as that was long past due, she was entitled to recover the principal sum as well as the interest. The law will not permit the splitting up of a cause of action of this nature, so as to make it a foundation for several actions. And though Frances Hunter in her life time, or her administrator after her death, might be chargeable as trustee of the principal sum, for the benefit of others, this did not constitute a bar to the prosecution of the suit brought by her against a maker of the note. It was pleaded as a bar to the entire action; and we think the court did not err in sustaining the demurrer to these pleas also.

For reasons indicated there was no error in ruling out the evidence offered, of certain provisions in the will of William Hunter, father of said Frances, concerning the disposition to be made of his estate in the event of the happening of certain contingencies specified therein.

Let the judgment of the Circuit Court be affirmed.

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[Denby v. Mellgrew.]

Denby v. Mellgrew.*Bill in Equity to enjoin Action at Law.*

1. *Mortgagee; title of, who can not set up against mortgagor or his heir.*—After default in the payment of the mortgage debt, the legal estate in the mortgaged property vests unconditionally in the mortgagee, and there remains in the mortgagor only an equity of redemption; yet, as against all the world, except the mortgagee and his privies in estate, the mortgagor or his heir at law may be regarded as the owner of the fee, and strangers can not set up the mortgage to defeat a recovery in ejectment by him.

2. *Mortgagee in possession; what must do when seeking to foreclose.*—A mortgagee or his assignee, who is in possession, may come into equity for a foreclosure, although he is clothed at law with the legal title; but when he comes into equity for that purpose, he must offer to do equity by accounting for rents and profits.

3. *Assignee of mortgage debt, when necessary party to bill for foreclosure.*—Where a mortgage debt is assigned by parol, the legal title remaining in the mortgagee, he is a necessary party to a bill for foreclosure filed by the assignee.

4. *Payment of debt by third party without request; when debtor liable to party paying.*—Although generally one man can not make another his debtor by paying his debt to a third party without his request; yet, if the debtor avails himself of the payment, by insisting on it as a satisfaction of the debt, he thereby becomes liable to the party making the payment.

APPEAL from Chancery Court of Mobile.

Heard before Hon. HUBERTO AUSTILL.

This was a bill filed by appellant, Charles Denby, to enjoin an action of ejectment, commenced by appellee, Mellgrew, by his next friend, for the recovery of the possession of a certain lot in the city of Mobile.

Mellgrew's claim of title is as follows: One C. F. Mellgrew conveyed the lot in controversy to Eliza, his wife, in fee, by voluntary deed, in March, 1858. Mrs. Mellgrew died May 8, 1862, leaving an only son, George H. Mellgrew, who was killed in battle, in June, 1863, leaving the appellee his sole heir.

The appellant claims an equity growing out of the following facts: C. F. Mellgrew, before his marriage with his wife, executed a mortgage on the land to Nicholas Thompson, in 1856. He and his wife, in 1859, executed a mortgage on the same lot to Collier H. Minge, and in June, 1862, they executed another mortgage on the same lot to Welsh. In June, 1863, Briggs, wishing to purchase the lot, negotiated with Thompson, the first mortgagee, and paid to him the amount due upon the several mortgages, which Thompson bought up

58	147
98	312
58	147
123	614
58	147
140	219

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and transferred to Briggs. The balance of the purchase-money agreed on was paid to C. F. Mellgrew, who thereupon executed to Briggs a warranty deed and put him in possession. In November, 1863, Briggs sold and conveyed the premises by warranty deed to Spence, who, in 1866, conveyed them by warranty deed to the appellant Denby. There is no averment that any of these mortgages were assigned by Briggs to Spence, or by Spence to Denby, the appellant. The bill prayed that appellees be perpetually enjoined from prosecuting their ejectment suit, or if the court was of opinion that they held the legal title, that they be required to pay back and refund the several sums, with interest, which had been paid by Briggs in order to free the said property from encumbrances. There is no offer in the bill to account for rents and profits, and a demurrer was interposed, which assigned this failure to do so, among other grounds. The chancellor, on the hearing, dismissed the bill for want of equity and dissolved the temporary injunction which had been granted, and this decree is now assigned as error.

D. P. BESTOR, for appellant.

HERNDON & SMITH, *contra*.

BRICKELL, C. J.—Unless the bill is intended as a bill for foreclosure of the several mortgages, of which the complainant claims to be the equitable owner, it is without equity. As to the appellee, the complainant, is, at law seized in fee of the legal estate, and has a full and complete defense to the action of ejectment. The conveyance to Eliza Mellgrew, the source of the title of the appellee, was subject and subordinate to the prior mortgage, the grantor had executed to Nicholas Thompson. The conveyance created by its terms in Mrs. Mellgrew an equitable, not a statutory separate estate. This estate she could mortgage, or alien on any valuable consideration, in the mode prescribed by the statutes, as if she were a *feme sole*.—*Short v. Batile*, 52 Ala. 456. The subsequent mortgages executed by her and her husband, were valid and operative, at law, conveying the premises to the several mortgagees, on condition, of which, in a court of law, the estate was freed, when broken by the default of the mortgagors. In a court of equity, there remained in the mortgagors, an equity of redemption—the right to revest themselves with the estate, on the payment of the mortgage debt. This equity descended to the appellee. As to all others, than the mortgagees, and their privies, the mortgagor, or his privies in estate may be regarded as the owners of the fee—strangers

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may not set up the mortgages as an outstanding title, to bar entry, or defeat an action for the recovery of possession. The mortgagees, and their privies may, for at law they are entitled to the possession, and are the owners of the legal estate.

Whatever may be said in reference to the other mortgages, and the relation of the appellee to them, it is certain he is the assignee of the mortgage to Minge, and that the assignment passed not only the mortgage debt, and would in equity operate as an assignment of the mortgage, but being by deed, with proper words of conveyance, passed the legal title, and is a conveyance of the land itself.—*Graham v. Newman*, 21 Ala. 497. The assignee, Briggs, by deed conveyed to Spence, with covenants of warranty, and he having in like manner conveyed to the appellant, the legal estate became vested in the appellant, and must prevail at law over the equity of the appellee. No question of the priority of the several mortgages can arise between the parties to this controversy. The mortgages are all operative against the appellee, and as between him and the several mortgagees, each is at law a conveyance of the legal title.

Though a mortgagee or his assignee is in possession, and is clothed at law with the legal estate, he may come into equity for a foreclosure. The quieting of the title, the prevention of future litigation, is a substantial ground for the interference of equity. But when he comes, he must offer to do equity—to account for rents and profits, which it is the right of the mortgagor to have applied to the payment of the mortgage debt. The present bill is wanting in such offer, and the defect was one of the grounds of demurrer.

A transfer of the mortgage debt, whether by writing or by parol, is in equity the assignment of the mortgage.—*Duval v. McLoskey*, 1 Ala. 208. If the assignment is not in writing, but by parol, the legal title to the debt, and the legal title in the premises remaining in the assignor or mortgagee, the assignee seeking a foreclosure, must make the assignor a party, that the legal title and estate may be bound by the decree.—*Prout v. Hoge*, present term.

The present bill is defective for want of parties, the mortgagees, Thompson and Welch, to whose mortgages we think the complainant is in equity entitled to be subrogated, not being made parties. The general rule may be, as stated by the Chancellor, that no man can make another his debtor without his consent. And if one without request, pays money in satisfaction of the debt of another, it can not be recovered. The law, however, is not so unconscionable, as to permit the debtor to avail himself of the payment, and yet

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escape liability to the party making it. By accepting and insisting on the payment, as a satisfaction of the debt of his creditor, he becomes liable, and the debtor of the party making the payment.—*Roundtree v. Weaver*, 8 Ala. 314; *Roundtree v. Holloway*, 13 Ala. 357; *Evans v. Billingsley*, 32 Ala. 395. The appellee may not claim the benefits of the payment made by Briggs, and yet escape liability to him. It is apparent from the whole transaction, that the application of the purchase-money of the premises, paid by Briggs to the several mortgagees, was designed only for the purpose of removing the mortgages as incumbrances on the premises, and perfecting his title. To allow such payments to operate as a satisfaction of the mortgages, converting the equity of redemption into a legal estate, would defeat the intention of the parties, and would be inequitable—the mortgagor would simply take without compensation the money of another. Justice is done, the intention of the parties consummated, when the complainant, who has succeeded to the estate of Briggs in the premises, is allowed to claim these debts shall be satisfied, before the mortgagors or their heirs shall be revested with the legal title.

The decree of the Chancellor must be affirmed.

Chandler v. Tardy.

Bill in Equity to Establish Title.

1. *Claim of title; when must fail.*—A claim of title to land, through an instrument which is not recorded, will fail against one purchasing and receiving a conveyance in good faith, for a valuable consideration, without notice, actual or constructive, of such claim.

2. P. was the original source of title to lands. In the year 1852, he conveyed by deed, attested by two witnesses, an undivided sixth interest in the north half of a certain square, to C., and afterwards, in the same instrument, conveyed his undivided sixth interest in the south half of the same square to C., for the use and benefit of his son, J. This instrument was not proved or acknowledged for record or recorded. In 1856, P. conveyed his undivided interest in the same lands, on valuable consideration, to C. in fee. This deed was duly acknowledged and recorded. C. mortgaged the lands in 1857 and 1858 to W., who purchased under decree for foreclosure, and afterwards sold in 1864 to T.; neither W. nor T. then, or before, having any knowledge or notice of the deed of 1852. After T.'s purchase, it was found among C.'s papers. In 1866, on bill for partition among tenants in common, three of the lots, in the south half of said square (to one of which J. claimed to be entitled upon division, as owner of P.'s undivided interest), were allotted to T. as the assignee of Primrose's original undivided interest therein. The claim of J., under the deed of 1852, was brought to the attention of the court, and it was decreed that the titles to the lots be vested in T., "subject to any equity J. might establish."

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The decree, however, did not determine J.'s equity, but left the matter open.
Held,

1. The deed of 1852, under which J. claimed, never having been recorded, purchasers from C. for value without notice, in good faith, and those claiming under them, were protected against J.'s claim.

2. Although the decree, upon partition, might afterwards put purchasers from T. on notice of J.'s claim, as information thereof would appear in the claim of title; yet, as T.'s purchase was made previously, when he had no notice, actual or constructive, and as the lots partitioned stood in lieu of the interest originally purchased, T. can transmit them free from any burden or charge not attaching to the undivided interest in his hands.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. H. AUSTILL.

The opinion states the facts.

ALEX. MCKINSTRY, for appellant.

JOHN T. TAYLOR, *contra*.

MANNING, J.—In 1852, one Primrose, who had an undivided interest of one-sixth part in a square of ground in the city of Mobile, signed a deed, attested by two witnesses, to the late Daniel Chandler, which purported to convey to him Primrose's interest in the north half of this square; after which, in consideration of professional services rendered by said Daniel Chandler to Primrose, and of the sum of one dollar paid by Daniel Chandler, it is recited in the same instrument, that Primrose bargains, sells and conveys, remises, releases and quit-claims "unto the said Daniel Chandler, for the use and benefit of his son, John L. Chandler, one lot of land on St. Louis street, and between Royal and Water streets, hereafter to be laid out and designated, the said lot to have a front of twenty-five feet on St. Louis street, by a depth of one hundred feet to an alley-way; said lot being on the north side of St. Louis street; to have and to hold the said lot to the use and benefit of said John L. Chandler." This lot would be in the south half of the square aforesaid. Then follows a request to Primrose's co-tenants in common, "as soon as the said lots are laid out and designated, to convey one of the lots, situated and described as above stated, to the said Daniel Chandler, for the use of his son, John L. Chandler." The instrument containing these provisions, remained among the papers of Daniel Chandler, but was not proved or acknowledged for record, or recorded. The John L. Chandler spoken of in it, is the appellant in this cause, and was then about fifteen years old.

Subsequently, in November, 1856, in consideration of \$18,500, Primrose, by his deed, conveyed with warranty, "all his right, title, interest, and claim at law or in equity, it being

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the one undivided sixth part of" the same square of ground aforesaid, to said Daniel Chandler, his heirs and assigns forever. The execution of this deed was acknowledged by Primrose in March, 1857, before a notary public in Mobile, and it was recorded in the office of the probate court.

In 1857 and 1858, mortgages were made by Daniel Chandler, of this and much other property, to several of his creditors, and, among others, to L. M. Wilson; who, on a sale in June, 1860, under a decree for the foreclosure of the mortgages, purchased the one-sixth interest in the south half of the square aforesaid, for \$2800, and afterwards, in March, 1864, sold his right, title, and interest in the same to defendant Tardy, for \$10,000 in Confederate treasury notes; neither of them having, then, or before, any knowledge or information of the existence of the instrument dated in 1852, under which appellant claims title. It was supposed, for a long time, by appellant, to have been lost; but was found by him, among his father's papers, after Tardy's purchase.

In March, 1866, upon a bill filed for a partition of the square aforesaid, and other property belonging originally to the same tract, among the tenants in common thereof, this square was divided into lots, and three of those in the south half of the square were allotted in severalty to Tardy, as assignee of Primrose's original interest of one undivided sixth therein. And at this time, as is shown by the decree of partition, the attention of the court was called to appellant's claim to an interest therein. For, a part of the decree in relation to the south half of the square, of which a map or plat was appended, reads as follows: "To the representatives of William D. Primrose, are allotted the lots numbered twenty-six, twenty-seven, and twenty-one. And it appearing that said Primrose, in his life time, sold and conveyed his right and title, and that said Tardy is the holder thereof, it is, by the consent of parties, ordered and decreed that the title to said lots be decreed to and vested in said Tardy; but subject to any equities which John L. Chandler may establish to one lot to be taken from said Primrose's share of said southern portion of said square of land, the rights between said Tardy and said Chandler not being passed on in this decree."

From this time a purchaser of the property might probably be charged with notice that John Chandler claimed a part of it, as information to this effect would be found in the chain of title. But Tardy's purchase was previously made; and the evidence of both Wilson and himself clearly proves that he had no notice of the claim now set up by Chandler when, for a valuable consideration paid, Tardy bought from

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Wilson (to whom it came from Chandler's father) the original share of Primrose in the south half of the square.

Tardy thus acquired the entire undivided one-sixth which had belonged to Primrose. And as the three lots which were by the partition, set off in severalty, took the place of the undivided one-sixth, Tardy received and can transmit them incumbered, with no charge or burden which did not attach to the undivided one-sixth in his hands.

The law is very clear that where one claims title to land through an instrument which is not recorded, his claim will fail against one who purchased the land, in good faith, for a valuable consideration without notice, actual or constructive of such claim. As we have seen, Tardy did not have actual notice, and there was nothing in the claim of title from Primrose, through his deed of 1856, to appellant's father, to charge Tardy with notice of appellant's claim under the instrument of 1852. Between the two, Tardy had the better title, and that better title he conveyed to defendant, Turner.

Without considering the case in any other aspect, it is evident that we cannot grant to appellant the relief he claims.

Let a decree be entered as of the 12th day of December, 1876—the day when this cause was submitted—affirming the decree of the chancellor.

Einstein, Hirsch & Co. v. Marshall & Conley.

Action on the Case for false Recommendation.

1. *Recommendation; when subjects person giving to action, if false.*—A recommendation is not a guaranty; yet, if a person recommends to a wholesale merchant one who desires to purchase goods on a credit, knowing that the merchant is unacquainted with his financial condition and credit, good faith requires that his representations must be true; and if he knowingly or recklessly makes false representations, on the faith of which the merchant sells goods on a credit, and loses thereby, an action for damages lies against him.

2. *Charge to jury; what free from error.*—In action against a writer of a letter of recommendation in these words, "Mr. H. is doing a small but safe business in this town; he wishes to buy several hundred dollars worth of groceries from you; he is good for all he buys, and you may safely sell him a bill; we recommend him to you, and hope you will treat him satisfactorily,"—the court having instructed the jury as follows: The effect and meaning of the letter is, that H. had, at the time, the ability to pay for all goods purchased by him; that he had at his command means, property or money, with which to pay for all goods he might buy from plaintiffs, and his ability was such as to make it safe for plaintiffs to credit him; that, in order to make a man good in the sense in which the word is here used, it is not necessary for him to

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have more property than is exempt from levy and sale under execution; but the word cannot be restricted to a willingness to pay when in funds, nor merely to the promptness with which he had previously met his obligations; but that he had, at the time, property or money with which to meet the amount for which he was recommended, or was in condition and could command the same when the debt fell due; that the term *several* means more than two, but not very many, and includes seven—*held*, that there was no error in these instructions.

3. *Same; when erroneous.*—A charge to the jury in these words: If the jury believe from the evidence that the defendants represented to plaintiff, as alleged in the complaint, that he was good for all he might buy on a credit, they must then find from the evidence whether, at the time the representation was made, H. had property enough to enable him to pay the amount for which he was so recommended to credit, and that if he had not such property, he was not good for such amount"—asserts an inaccurate test of ability to pay, and is erroneous.

APPEAL from the Circuit Court of Perry.

Tried before Hon. GEORGE H. CRAIG.

This was an action on the case for damages, brought by the appellees, Marshall & Conley, against the appellants, Einstein, Hirsch & Co., for falsely and fraudulently recommending as worthy of credit, one Max Heller. The evidence showed that, in 1871, Heller came to the store of Marshall & Conley, and presented a letter, of which the following is a copy:

"UNIONTOWN, Sept: 26th, 1871.

Messrs. Marshall & Conley, Mobile, Ala. :

DEAR SIR—The bearer of this, Mr. M. Heller, is doing a small but safe business in this town. He desires to buy several hundred dollars worth of groceries from you. He is good for all he buys, and you may safely sell him a bill. We recommend him to you, and hope you will treat him satisfactorily.

Very respectfully, yours, &c.,

EINSTEIN, HIRSCH & Co."

It was admitted that this letter was written by Hirsch who was a member of the firm of Einstein, Hirsch & Co., and that he gave it to Heller to be delivered to the appellees.

Heller obtained goods of the appellee to about \$600 or \$700, and died, leaving the bill unpaid and no property. Mr. Marshall and the clerk, who sold Heller the goods, both testified that they sold them to him solely on the recommendation of Einstein, Hirsch & Co., and that the only information they had of his commercial standing was derived from the letter copied above. Several witnesses testified that Heller, at the time he obtained the goods of appellees, had no property except a small stock of goods, and that these were not over the amount allowed by law as exempt. One Cohen, a witness for plaintiff, testified that he would not have cred-

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ited Heller for the amount of several hundred dollars, and that his stock at the time the credit was given did not, in his opinion exceed one hundred dollars in value. This witness further testified that, in 1870, Heller came to Uniontown, and began to peddle with a pack, and that he continued in this business until the summer of 1871, when he rented a store from witness and commenced doing business therein, keeping cakes, candies, fruit, &c. Upon cross-examination, this witness testified, that Heller had always promptly paid the rent in money, except the last month, when he paid it in flour. One Marx, also a witness for plaintiffs, testified that he was a merchant in Uniontown, and had lived there since 1868; that he was familiar with the value of the class of goods which Heller kept, and that, in his opinion, the stock at no time exceeded one hundred dollars in value. One Nounenmacher, a witness for the defendant, testified that he became acquainted with Max Heller in the fall of 1869, and that said Heller boarded with him off and on, from that time until the spring of 1871, and always paid his board bills promptly, which were about four or five dollars at a time; that during the year 1870, Heller frequently had money on deposit with him; and that, in 1871, he recollected that he had on deposit, at one time, about three hundred dollars, which he drew to go after his family, which then resided in Chicago, or shortly after his return, and that this deposit was the last he had with the witness. One Lowengard, who was a merchant in Uniontown, testified that he would have sold Heller all the goods he wanted on a credit; that he had sold him several bills of goods, which he had promptly paid for, and that he was a prudent, hard working, industrious man. On cross-examination, this witness stated that, to the best of his recollection, the bills sold to Heller by him, and above referred to, did not amount to more than five or six dollars at a time, but that he would have sold him more if he had wanted them. Hirsch, one of the defendants, testified that he gave the letter, above set out, to Heller for the purpose of being delivered to plaintiffs; that he knew Max Heller, and had known him since 1869 or '70; that his firm had been selling Heller goods for about two years, and that all goods sold him were promptly paid for; and that he would willingly have sold him a thousand dollars worth of goods on a credit; that he gave the letter at the request of Heller, who stated that he wanted to buy in Mobile of first hands, and that he never intended or anticipated that Marshall & Conley would suffer any loss; and that he was not interested with Heller in any of his business; that he gave the letter, as a matter of accommodation, to

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Heller, believing it to be true and without any intent to injure the appellees, or any expectation of gain thereby.

This was all the evidence, and the court, at the request of plaintiffs, gave its charge in writing, as required by the Code, which charge is as follows: "The plaintiffs sue to recover of the defendants a certain amount of money, as damages suffered by them by the sale of goods to Heller on the recommendation of defendants. The plaintiffs must make out their case by the weight or preponderance of the evidence before they can claim a verdict. Defendants admit that they wrote the letter which is the foundation of this suit. In order to recover, plaintiffs must show that they sold Heller the goods; that they made the sale by reason of the letter of recommendation referred to; that he was damaged; the amount of damages; that such damage was the result of such sale; that the statements which were made in the letter, which induced the sale, were false; that the defendants knew them to be false when they made them; and that they made such statements with the intent to deceive the plaintiffs. If they have made this to appear to your satisfaction, by the weight of the evidence, then they are entitled to recover the amount they have shown to be the damage, and interest to date.

"The letter, in evidence, which is the foundation of this suit, is a letter of recommendation of Heller. Its effect and meaning is, that Heller's condition was, at the time, good; that is, that he was sufficient; that he had the ability to pay for all goods purchased; that he had at his command means, property, or money, with which to pay for all goods he should buy from the plaintiffs, and that his ability was such as to make it safe for the plaintiffs to trust or credit him.

"It is not necessary for a man to have more property than is exempt from levy and sale under execution, to make him good in the sense in which it is here used; but you can not restrict the word *good* to a willingness to pay when in funds, nor merely to the promptness with which he had before met his obligations; but that he had at the time property or money with which to meet the amount for which he was recommended, or was in a condition and could command the same when the amount for which he obtained credit fell due.

"The term, several hundred, means more than two, but not very many hundred dollars, and seven hundred dollars is included in the term as used.

"If the weight of evidence satisfies you that the defendants wrote the letter in evidence for the purpose of obtaining credit for Heller with plaintiffs, and did so with the inten-

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tion and expectation that the plaintiffs would act upon the representations made in such letter as to Heller's ability to pay for the goods bought; and if the evidence shows that such representations were false, and that the defendants knew them to be false at the time; that the plaintiffs did act upon such representations, and by reason thereof suffered loss, then the jury would be justified in the presumption that the defendants intended, in writing the letter, to deceive and defraud the plaintiffs; and if you so believe, the plaintiffs are entitled to recover in this case the amount of damages proved, with interest, and they are not excusable from the fact that they received no benefit from the transaction.

"The defendants say, when they wrote the letter, which is the foundation of this suit, Heller was solvent, was able to pay, and that they did not intend to deceive or defraud plaintiffs, by writing the letter referred to; they say that they made the representations in good faith, believing them to be true, not knowing them to be false; and that their dealings with him, and the reputation which he had established as an honest and prompt man of business, and the goods which he had on hand, were the reasons that lead them to their belief of his ability to pay, and their trust and confidence in him. The jury should look to the evidence of Heller's condition as to property and reputation, in ascertaining the fact of the truth or falsity of the statements made in the letter, and of the intention of defendants in making such representations.

"A mere opinion of defendants as to Heller's ability to pay would not bind them, unless the intention to deceive is also established; but if one make representations of the ability of another to pay, intending that a third party shall act upon such representations, and makes the representations to the third party recklessly, and without regard to their rights, and such representations are acted upon, and the person to whom they were made, and who acted upon them, is damaged thereby, and the representations prove to be false, then the jury may presume that the intention to deceive existed; and, if so, the person damaged would be entitled to recover in an action against the party making the representations."

Various portions of this charge were excepted to by the defendants, but the view which the court took of the charge, as a whole, renders it unnecessary to set them out specifically.

The court, at the written request of the plaintiffs, gave the following charges, which were separately excepted to by the defendants:

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1. If the jury believe, from the evidence, that the defendants represented to the plaintiffs, as alleged, that Heller was good for all he might buy on a credit, and that plaintiffs might safely sell him a bill of goods on a credit; that such representations were made by defendants with the intent to influence plaintiffs to sell Heller a bill of goods on a credit; that plaintiffs were thereby induced to make such sale to Heller; that Heller was not, at the time such representations were made by defendants, good for the amount for which he was so recommended for credit; and that defendants were aware, at the time they made the representations, that Heller was not good for such amount—then it follows, as a necessary consequence, that the defendants made the representations with the intent to deceive and defraud the plaintiffs, as every man is presumed to intend the necessary consequences of his act; and if the plaintiffs sustained damage by acting upon such representation, they will be entitled, in this action, to recover such damages, not exceeding one thousand dollars.

2. That representations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing the party's own interests. If one make representations productive of loss to another, being aware, or having good reason to believe, at the time, that such representations are false, he is responsible as for a fraudulent deceit.

4. If the jury believe, from the evidence, that defendants represented to plaintiffs, as alleged, that Heller was good for all that he might buy on a credit, they must then find from the evidence whether Heller had, at the time the representations were made, enough property to enable him to pay the amount for which he was recommended to credit; if he had not such property, he was not good for such amount.

The giving of these charges is now assigned as error.

J. W. BUSH, and W. B. MODAWELL, for appellant.—No presumptions of fraud can be indulged in. To constitute fraud, every essential ingredient must be clearly proved. The recommendations, to be actionable, must be *knowingly and wilfully* false. It is not enough that they be *negligently* made, for the intent to deceive is the very gist of the action.—44 Barb. 498; 40 New York, 565; 2 East, 92; 11 Wend. 375; 24 Ga. 461; 30 Vermont, 797; 1 Metcalf, 1.

W. E. & R. H. CLARKE, and THOS. H. WATTS, *contra*.—In order to prove such fraud as the law considers sufficient to support the action, it is only necessary to show that what

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the defendants assert was false within his own knowledge, and occasioned damage.—1 Smith Lead. Cases, marg. p. 79, and authorities there cited; 7 Cranch, 69. One who recklessly, and without regard to the rights of another, makes to such other a false statement, intending it to be acted upon, is liable in damages if it be acted upon to the damage of such other.—16 Ala. 785; 18 Ala. 332; 29 Ala. 352; 35 Ala. 254; 38 Ala. 363; Kerr on Fraud and Mistake, 53-4, 5, 6, 7, 68-9, 82, 85, 324; 13 C. B. 77; 17 Beav. 871; 11 M. & W. 415.

STONE, J.—Commercial credit has become one of the conditions of commercial prosperity. Ability to pay, punctuality, and business qualifications are the foundations on which such commercial credit can alone be maintained. In mercantile transactions, the retail dealer must necessarily purchase from the wholesale merchant; and these two classes generally have their business residences remotely apart. When a stranger desires to purchase on credit, safety, as well as usage, requires that he shall furnish to the wholesale dealer, satisfactory assurance that he is worthy of credit. This assurance is frequently given in the form of a letter of introduction and recommendation. The wholesale merchant, having no other means of information, must, and does rely on it, if he knows and has confidence in his correspondent. Based on such recommendation alone, he parts with his merchandise, in value amounting to hundreds or thousands of dollars. And this very consequence is the expected, intended, known result of the recommendation. This being the case, common sense, as well as the law of the land, demands that good faith shall be observed in giving such recommendations. Bad faith in such case, is a fraud on him who acts upon it to his damage.

The general doctrine on this subject may be stated as follows:

“An action will lie against an uninterested person for making a false and fraudulent representation of a fact as then existing, (and not otherwise) to the seller, whereby the latter sustains damage by trusting the purchaser on the credit of such misrepresentation. . . . But this rule only applies to cases where the representation by a third person is known by him to be false, since otherwise it can only have weight as an expression of opinion; for if it appear to have been made by him, *bona fide*, he will not be liable, although it prove to be unfounded.”—Sto. Contr. § 515. See, also, *Russell v. Clark*, 7 Cranch, 69; *Pasley v. Freeman*, 3 T. R. 51; *Addington v. Allen*, 11 Wend. 374; *Lord v. Goddard*,

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13 Pet. 198; *Corbit v. Gilbert*, 24 Geo. 454; *Haycraft v. Creasy*, 2 East, 92; *Tryon v. Whitmarsh*, 1 Metc. (Mass.) 1; *Wakeman v. Dalley*, 44 Barb. 498.

In this extract, it will be observed, the author's language is, that to be actionable, the representation must be both false and fraudulent. A representation of what is believed to be true, though false in fact, can not, when made by a stranger, confer a right of action. It would be monstrous to hold parties civilly responsible for the consequences, to strangers, of mere errors of judgment or fact, into which they were innocently betrayed. Bad faith—the intended creation of an impression known to be false—on which another relies and acts, and thereby suffers loss, is what the law stamps with the stigma of fraud, and condemns. The known misrepresentation and its consequences consummate the fraud.—*Foster v. Charles*, 6 Bing. 396; *Corbet v. Brown*, 8 Bing. 433; *Polhill v. Walter*, 3 B. & Adol. 122; *Pontifex v. Reynold*, 3 Scott, N. R. 390.

The old case of *Chandelor v. Lopus*, reported in 1 Smith Lead. Cases, 77, was the case of alleged fraud in the sale of a stone, which the seller represented as a Bezoar stone, and sold as such. Action on the case to recover damages, averring that the stone was not a Bezoar stone. The case was heard in the Court of Exchequer. All the Barons, except Anderson, held "the bare affirmation that it was a Bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no Bezoar stone, it is not material. For every one, in selling of his wares, will affirm that his wares are good, or that the horse he sells is sound; yet, if he warrants it not to be so, it is no cause of action." We submit, if this language does not sanction looser morals than the present state of the law will justify. In a note to this case, in 1 Smith Lead. Cases, 77, the authority of this case is doubted. The later authorities, even in England, we think entirely overturn it.

In *Baily v. Merrell*, 3 Bulstrode, 95, CROKE, J., said: "Fraud, without damage, or damage, without fraud, gives no cause of action; but where these two do occur, there an action lieth." And Lord C. B. COMYN said: "An action upon the case for a deceit lies when a man does any deceit to the damage of another."—Com. Dig. Title, "Action upon the case for a deceit."—A 1.

In the case of *Fuller v. Wilson*, 3 Q. B. 58, the question was, whether an action would lie for a false representation made, which induced a trade with the person whose agent made the representation in part. Lord DENMAN, C. J., delivered the opinion of the court and said: Whether there

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was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. . . . The question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them." This doctrine was adhered to in *Evans v. Collins*, 5 Q. B. 804.

In *Evans v. Edwards*, 13 C. B. 777, MAULE, J., said: "I conceive that, if a man having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it be done with a view to secure some benefit to himself, or to deceive a third person, he is, in law, guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." So in *Taylor v. Ashton*, 11 Mees & W. 401, it was said, "that in order to constitute fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose."—See, also, *Pulsford v. Richards*, 17 Beav. 87; *Bennett v. Judson*, 21 N. Y. 238.

This doctrine has received the repeated and unqualified sanction of this court. In *Monroe v. Pritchett*, 16 Ala. 785, it was held that, "In an action on the case by the vendee against the vendor of land, to recover damages for falsely representing that the tract embraced a certain designated portion of good land, whereby the vendee was induced to make the purchase, it is not necessary to prove that the vendor knew that the representation was false at the time he made it."—See, also, *Atwood v. Wright*, 29 Ala. 346; *Kelly v. Allen*, 34 Ala. 663; *Blackman v. Johnson*, 35 Ala. 252; *Foster v. Kennedy*, 38 Ala. 351.

But, it will be observed that, in all these cases, the question arose between the seller and buyer, on an alleged misrepresentation, by the former to the latter, of some property of the land or goods he was selling. In such case, the author of the injury receives the profit of it, and it is simple morality that he shall restore the ill-gotten reward, for which he has paid nothing. We have no wish to depart from this wholesome principle.

The question presented by the present record is different. The person who made the representation was a stranger to the contract, and did not, and could not, possibly derive any profit therefrom. If he be liable at all, it is simply because he has done the plaintiff an injury, "which nought enricheth him."

In *Kerr on Fraud and Mistake*, 324, it is said, "An action on the case for damages in the nature of a writ of deceit, lies

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at law against a man for making a false and fraudulent representation, whereby another is induced to enter into a transaction, and by so doing sustains damage. If the representation be false, it is immaterial that it may have been made without any fraudulent intent, or that the party who made it may have derived no benefit from it. The principle of law is, that fraud, accompanied by damage, is, in all cases, a good cause of action. A representation, however, honestly believed to be true by the party making it, is not, independently of the duty cast on him to know the truth, a good cause of action, although it may prove to be untrue."

In the case of *Boyd v. Brown*, 6 Penn. St. 310, a case presenting the question we are considering, the court said: "The ground of action is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is, did the defendant knowingly falsify, or wilfully suppress the truth, with a view of giving a third party a credit to which he was not entitled. It is not necessary there should be collusion between the party falsely recommending, and he who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough, if such has been the effect of the falsehood relied on. Misrepresentations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing the party's own interests. But the motives by which he was actuated do not enter into the inquiry. If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit."

In *Marsh v. Falkner*, 40 N. Y. 562, the court said: "The burden was on the plaintiff of showing, either that the defendant knew, or had good reason for believing, that Kahn was insolvent, and that the representations were, therefore, false when they were made; or, that he intended the plaintiff should understand him to be communicating his own actual knowledge by means of them, when he possessed no knowledge upon the subject."

In *Evans v. Collins*, 5 Q. B. 804, Lord DENMAN, C. J., delivering the opinion of the court, said: "He (the defendant) was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequences of his misconduct. The allegation that the

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defendant knew his representation to be false is, therefore, immaterial; without it, the declaration discloses enough to maintain the action; and nothing that goes beyond that necessity need be proved."—See, also, the important case of *Addington v. Allen*, in New York Court of Errors, 11 Wend. 374.

An unbending rule can not be laid down for all cases, where, upon the representations of an uninterested person, one trusts another, and suffers loss. Much must depend on the circumstances of the particular case. But when, as in this case, the person recommending knows that the object of the party procuring the recommendation is to obtain credit at a distance; knows that the proposed seller is unacquainted with the financial condition and credit of the proposed buyer, the law, in harmony with good morals and good neighborhood, requires that the same shall be faithfully and truthfully given. A representation, as fact, of that which the party knows to be false; or, of that, of the truth of which he has no knowledge or well-founded belief, falls below the standard of legal requirement. And if it turn out in fact that the representation is false, and the seller is deceived and suffers loss in consequence of the sale he made on the strength of it, the party recommending must make good the loss. It is no excuse for him that he did not collude with the purchaser; that he was not interested in, or benefited by the purchase, or that he did not know whether the representation he made was true or false. Good faith requires that what he represents as fact shall be true, or, that, from a proper knowledge of the surroundings, he is justified in having an intelligent belief that what he asserts is true. Mere spirit of accommodation, or desire to serve a friend, we fear, cause many recommendations, which entail heavy loss on him who trusts, and is misled by them. It is time it should be known that he who thus knowingly, fraudulently, or even recklessly enables one to cheat another, thereby shoulders the burden himself. Candor and good faith are what the law requires; for the law does not convert a mere recommendation into a guaranty. Nor is the onus on him who recommends another to prove the truth of his recommendation. The law presumes him innocent until the contrary is shown. And, as part of this, the law, in the absence of testimony, will presume that the recommender had proper knowledge whereof he spake, and that he had an intelligent belief of the truth of what he asserted.

When, however, the testimony convinces the jury that the recommendation was knowingly false, and on the strength of such recommendation credit was given, and a loss sustained,

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these, with the fact that the statements in the recommendation were false, constitute deceit and a right of action in favor of the person who was influenced thereby. And when given recklessly, or from favoritism, without knowing whether it is true or false, attended by the circumstances above postulated, these are proper facts, with the other testimony in the cause, to be weighed by the jury, in determining whether or not the defendant was guilty of the deceit charged; and, unexplained, would authorize a verdict in favor of plaintiff.

We do not think the Circuit Court erred in the construction of the letter of recommendation.—See words “several” and “good,” Dictionaries; see, also, *Crown v. Brown*, 3 Verm. 707.

In the general charge to the jury, and in the first and second charge given at the instance of plaintiff, we find no error of which appellant can complain.

In giving the charge numbered 4, asked by plaintiffs, the Circuit Court erred. The property owned by Heller, at the time of the recommendation, may have been insufficient of itself to pay for the goods he proposed to purchase; and yet, the goods purchased, added to his property previously owned, and his business qualifications and commercial standing, may have rendered him “good” for the “several hundred dollars” of goods, for which his solvency was vouched. We suppose that few merchants, in buying a stock of goods on time, expect, or are able to pay entirely for them, with means outside and independent of the proceeds of such goods, afterwards to be sold. The charge given ignored entirely this important resource of a merchant. Few dealers, we apprehend, could stand this severe test.

Again, this test might, and in many cases would, be utterly fallacious. The purchaser might own, “at the time the representation was made, enough property to pay” for the goods, and yet be “not good for such amount,” by reason of other debts, which rendered him insolvent.

For this single error, the judgment of the Circuit Court is reversed, and the cause remanded.

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1. *Sale of cotton, what part of contract for.*—When a contract for the sale of cotton is made in a city or town in which a board of trade is organized, having rules regulating the sale of cotton, and the purchaser, being informed of these rules, does not dissent or object to them, but proceeds with the contract, those rules become a part of it, as if incorporated into it by express stipulation, although they have not existed so long, or been known and acted on so generally, as to become binding as a custom or usage of trade.

2. *Same; what necessary to constitute.*—To constitute a sale, the parties must mutually assent that the property in the thing sold shall pass to the purchaser. A contract which confers on the party proposing to buy a right to inspect, examine and re-weigh the cotton within a specified time, and, on paying or tendering the price within a specified time, to demand a transfer of the ownership and possession, and also confers on the seller a corresponding right to demand such inspection, examination and re-weighing within the prescribed time, is not a sale, but an executory agreement for a sale, and does not pass the title of the cotton to the purchaser.

3. *Same; effect of order by seller to warehouseman.*—In such a case, a written order by the seller to the purchaser, directing the warehouseman, with whom the cotton was stored, to deliver it to a railroad company, for inspection and examination by the purchaser, on his paying the storage, does not pass the title to him nor change the character of the original contract between the parties; but the railroad company becomes the bailee of the seller, as between him and the purchaser.

4. *Sale of chattel by one having no title; rule as to; exceptions to.*—The general rule is, that a sale or pledge of a chattel by a person, who, though he has possession, has no right of property, and no authority to sell, confers no title as against the true owner, although the purchaser pays a valuable consideration or advances money in good faith, and without notice of the title of the true owner; but there are several recognized exceptions to this rule.

5. *Same.*—In the case of an immediate sale, under which the purchaser takes possession, with a condition annexed, that on his failure to pay the price at a future day the vendor may reclaim the goods, or a stipulation that the title shall remain in him until the price is paid, the title of a sub-purchaser, without notice of the condition or stipulation, will prevail over that of the vendor; but this exception to the general rule, which is founded on the policy of the registration laws, is confined to cases where there has been an actual sale, as well as a change of possession.

6. *Same.*—Another exception is, where the seller parts with his property under such circumstances of fraud as will authorize him to reclaim it from the purchaser; yet, if there has been an actual sale, although induced by fraud, the title of the sub-purchaser for valuable consideration without notice, will prevail over that of the vendor.

7. *Same.*—Another exception is where the owner of goods has, by his own act or consent, given another such evidence of a right to sell, or otherwise dispose of them, as according to the customs of trade or the common understanding of the world, usually accompanies the authority to sell or dispose of goods; but to bring a case within the exception, the owner must do something more than merely entrust another with possession of his goods.

8. *Bailee, failure by, to assert lien on goods held, when waiver of.*—If a common carrier or other bailee, when goods are demanded of him by the true owner, refuses to deliver them except to the consignee, or to the person hold-

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ing the receipt given for transportation, but asserts no lien for storage paid by him, he cannot afterwards set up that claim to defeat an action by the owner, but must be held to have waived it.

APPEAL from Circuit Court of Mobile.

Tried before Hon. HARRY T. TOULMIN.

This was an action of detinue, brought by the appellants, Leigh Bros., against the appellee, the Mobile and Ohio R. R. Co., to recover twenty-three bales of cotton. On the trial it appeared that the plaintiffs were the owners of the cotton sued for on the 30th day of November, 1874, and had the possession thereof, and that on that day they sold, or contracted to sell, the same to one A. J. Foster, under the following circumstances:

The sale, or agreement to sell, was made in Columbus, Miss., and the evidence tended to show that a custom prevailed in said city in the cotton trade, that purchasers were allowed a certain time to re-weigh, sample, and examine the cotton, (sales always being made by samples), and if satisfied to pay for it; that this was a general custom, based upon the rules of the board of trade of said city. The evidence also tended to show that such sales were considered *cash* sales, and that no title passed until after the examination and payment of the purchase money, and that possession of the cotton was given to the buyer for *examination only*. There was conflict as to the uniformity of this custom, and as to the construction of the said rules, and also as to the character of the orders generally given for examination; and the evidence showed that sometimes unconditional orders were given, and sometimes warehouse receipts were delivered to the purchaser, and sometimes the number and marks, with an order to turn down for examination. There was evidence that some firms dealing in cotton, did not hold themselves bound by these rules, and that the plaintiffs sometimes departed from them. There was conflict as to when, in the opinion of the witnesses, the sale was complete and the title passed in such cases.

The evidence showed that Foster had come to Columbus only a week or two before his purchase of the cotton in controversy, was a stranger there, and that he had bought a few lots of cotton before this, paying cash for it, some of which cotton he had bought of plaintiffs; that on the said 30th of November, 1874, he called in Williams, Johnson & Co., bankers, of that city, and inquired whether they would take his bills, drawn on a shipment of cotton, which he proposed to ship to Gardner & Foster, at Mobile, Ala. This was in the morning. They informed him that they would, if he would attach the bill of lading or railroad receipt to the bill

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drawn on the shipment, and instructed their cashier to give him the money, if he brought his draft with the bill of lading attached.

About 11 o'clock of the same day he purchased of the plaintiffs the twenty-three bales of cotton sued for, and was told at the time, of the custom and rules of trade, and that though the rules allowed him time for re-weighing and examining the cotton, the sale was not complete until the money was paid. After this agreement of sale, the book-keeper of the plaintiffs gave him the following order:

COLUMBUS, MISS., Nov. 30th, 1874.

Messrs. R. M. Banks & Co.:

Deliver to M. & O. R. R. Co. the following cotton:

H. C. Cocke 5

G. R. G. 3

J

G. R. G. 5

J J

W. S. M. 10

Shipmark, [B]

Mr. A. J. Foster will pay storage.

LEIGH BROTHERS.
Beman.

There was conflict in the evidence as to the character of this order under the rules, whether it was a general delivery order or an order for examination only, and whether it was in the usual form of examination orders.

One of the plaintiffs, F. M. Leigh, testified that he never intended the title to the cotton should pass, but distinctly told Foster, at the time of the sale, that it was to be a cash sale, and that no title could pass; that time was allowed only to allow him to weigh, sample and examine the cotton, and that the sale was complete only when the cash was paid. The said book-keeper testified that this order was given to deliver the cotton to the *railroad* at the instance of Foster, as he alleged that the platform of the railroad was a more convenient place to examine the cotton, and also requested him to put the ship mark [B], for the reason that he had no means of marking, and was unacquainted in the city; that he gave said order for the delivery of the cotton, and that it was to enable said Foster to examine the cotton. The form of this order was not known to the plaintiffs, but the authority of the clerk to give it was not disputed. Foster carried this order to the warehouse, where the cotton was stored by plaintiffs, and the cotton was sent in his name to

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the railroad by the warehousemen, who received dray receipts for it from the company. After all the cotton had been thus delivered, Foster applied to the railroad agent at Columbus for a general receipt for all, in place of the dray receipts, and received the following receipt:

MOBILE AND OHIO RAILROAD Co., }
C Depot, Nov. 30th, 1874. }

Received from A. J. Foster twenty-three bales of cotton, consigned to Foster & Gardner at Mobile, Ala., marked [B]. Charges, \$12.50. Total 23—marked by me—to be transported by Mobile and Ohio Railroad to Mobile, under stipulations and conditions contained in original receipts.

H. HALL, Station Agent."

Foster gave the station agent the usual memorandum required of shippers. With this receipt Foster again applied to Williams, Johnson & Co., drew his bill of exchange on Foster & Gardner for \$2300, attached thereto said receipt; they discounted the bill at one per cent. and paid Foster the money. This was between four and five o'clock in the evening of the 30th of November. The same night Foster absconded, without paying for the cotton, and has never since been heard from. When Williams, Johnson & Co. discounted said bill, they made no inquiry, and had no knowledge of any fraud, or whether the cotton was paid for or not; nor from whom Foster had obtained the cotton, and had never seen or known of said dray receipts or of the order delivered by plaintiffs to Foster.

It was also shown that said defendants, when they gave said receipt attached to said bill of exchange, made no inquiry as to how Foster had obtained the cotton; that they had never seen and did not know of the order given Foster by plaintiffs, and were ignorant of any fraud on the part of Foster, or of any claim on the part of plaintiffs to the cotton.

It was shown by plaintiffs that before bringing this suit they demanded the cotton of said defendant in Mobile, while it still had it in possession, and proposed to pay the freight, but the railroad company refused to deliver it, and stated that it would not deliver it to any one but the person to whom it was consigned, or who held the receipts. The evidence tended to show that the company, on the receipt of the cotton, had paid the warehouse charges, amounting to \$12.50, but there was no evidence that the plaintiffs knew this at the time the demand was made for the cotton, and the company did not claim to hold possession for these

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charges, nor did it make it known at that time that it had paid them. Certain sections of the Code of Mississippi were introduced to show that the obtaining of goods under false pretences was a felony, and that bills of lading and railroad receipts were not negotiable.

It was shown that the draft was not accepted or paid by Foster & Gardner, and was still unpaid. This was substantially all the evidence, and the court charged the jury as follows: "If you believe from the evidence that the plaintiffs delivered the cotton to Foster, without any intention to transfer the title to him, but under a contract for the sale of the cotton at a future day, when, on examination, it should be satisfactory, when payment of the purchase money was to be made, then no title vested in him until such payment, and he acquired no title under such agreement, and could communicate none to Williams, Johnson & Co., and plaintiffs would be entitled to recover, unless you should find from the evidence that the acts and conduct of the plaintiffs in the matter, were such as to indicate a waiver of their rights to the cotton, and were calculated to mislead and deceive Williams, Johnson & Co., and that they, (W., J. & Co.) under these circumstances, bought the bill in question, with the railroad receipt attached, for full value. If you find from the evidence, there was a custom of trade in Columbus, where this transaction took place, by which two days were allowed for the examination of cotton in lots of this number of bales, and that in accordance with such usage, title did not pass until the cotton was paid for, and that said cotton was sold in accordance with and in reference to such usage, then the payment of the purchase money was necessary, before the title passed to Foster, and he could confer none on Williams, Johnson & Co., and plaintiffs would be entitled to recover, unless you find from the evidence that the acts and conduct of the plaintiffs, in their transaction with Foster, and their manner of dealing with him were such as to reasonably mislead and deceive, and did mislead and deceive, Williams, Johnson & Co. in their dealing with the said Foster, without any fault or negligence on their part. If you believe from the evidence, the sale by the plaintiffs to Foster was to be a cash sale, in case the examination of the cotton was satisfactory, and that a certain time was given Foster to examine the cotton, and if satisfied to pay for it, and that the order for possession of the cotton was given only for the purpose of examining it, and not to confer any title or ownership on Foster; and if you further believe that said Foster, during the time allowed him for examination, and without paying for it, fraudulently disposed of the cotton, and ob-

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tained an advance on it from Williams, Johnson & Co., and transferred to them the railroad receipt, without the knowledge or consent of plaintiffs, you must find for the plaintiffs, unless you find plaintiffs did some act calculated to deceive, and which did deceive, Williams, Johnson & Co., without fault or negligence on their part. A custom must be general and uniform; but it is not indispensable to its validity, that it should be universally acquiesced in."

The court then gave the following written charges, at the request of the railroad company :

"1. If the jury believe that the plaintiffs sold the cotton in question to Foster, and gave to him the order given in evidence, and if the cotton was placed by the warehousemen in possession of the railroad company, under and pursuant to the order, the railroad company was justified in presuming that Foster was the owner, and in giving its receipts to Foster, unless it is shown by the evidence that the railroad company knew, or had reason to believe, that the plaintiffs had not been paid; and if Williams, Johnson & Co., without knowing, or having reason from facts given in *evidence to believe*, that the cotton had not been purchased and paid for, bought the bill drawn by Foster with the railroad receipt attached in good faith, the plaintiff cannot recover.

"3. To constitute a usage of trade, there must be a mode of dealing in reference to the matter so generally adopted, and acted on, by those in the business to which the usage relates, as to justify the inference that the actors dealt in reference to it, and if they believe that in Columbus no fixed rule prevailed to the effect, that the cotton was not sold until paid for, but that the mode of dealing in this respect was one way or the other, indifferently, as parties elected, the plaintiff can claim nothing by virtue of any such supposed rule.

"4. If the jury believe that the order of plaintiff was calculated to induce the belief that the cotton was to be turned over for shipment on account of Foster, and if the railroad company, under such belief, and without knowledge or notice to the contrary, gave its receipt, or bill of lading, to Foster, and Williams, Johnson & Co., upon the faith of the shipment, and in ignorance of the fact that plaintiff had not been paid for the cotton, and in ignorance of any fact to create in their minds a doubt of such payment, bought the bill in question in good faith and for full value, and without notice, and took the bill of lading attached as security for the bill, plaintiff cannot recover.

"5. If the jury believe that the plaintiff and Foster so dealt in reference to the sale of the cotton, as to induce the belief that Foster was the owner of the cotton, and if under such

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belief Williams. Johnson & Co. purchased the bill, with the railroad receipt attached, in good faith, for full value, and without notice or reason to suspect, plaintiffs can not recover.

"7. If the jury believe from the evidence that the delivery order given by plaintiff, was an order of final delivery, and that Williams, Johnson & Co. bought the bill in good faith, and for full value, with the railroad receipt attached, and without notice, plaintiff can not recover.

"8. To maintain this action, plaintiffs must show a right to the possession of the property at the time the suit is brought, and if under plaintiff's order the warehouse expenses were paid by the road, the plaintiff was not entitled to such possession, and can not recover, unless before suit brought plaintiff paid, or offered to pay, such expenses; and an offer merely to pay, the freight of the road does not entitle them to maintain this suit.

"9. If the jury believe, from the evidence, that Leigh Bros. gave a delivery order in such form as reasonably misled their own warehousemen into supposing that it was a final delivery order for shipment on account of Foster, and that being so misled the warehousemen delivered the cotton to the railroad expressly to be shipped for account of Foster, and that Foster was in this way enabled to get possession of the railroad receipt, and with it deceived Williams, Johnson & Co. into believing that he had absolutely bought it, and received possession, and thereby induced them to part with their money *bona fide*, without notice of non-payment of purchase money, by drawing with bill of lading attached, defendant is entitled to a verdict.

"10. Whether plaintiff intended to waive his right to the cotton, is not the only question. The point is, Did plaintiffs or their agents do any thing to lead other persons to lay out their money in the reasonable belief that the plaintiffs had sold and absolutely delivered the cotton?"

These charges were separately excepted to, and are now assigned as error.

JOHN T. TAYLOR, and BOYLES & OVERALL, for appellant.—There was no complete sale of the cotton. No title ever passed to Foster. It was an agreement to sell in case the purchaser was satisfied on examination, and the cash paid. It was to be a *cash sale*, and amounts to nothing until the cash is paid. Foster was informed of the rules of the board of trade, and he expressly made the agreement that the proposed sale should be made in reference to them; and possession was given him *only* for the purpose of examination; and

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it makes no difference, on this point, whether the rules of the board of trade were a valid custom or not; the parties expressly agreed that the title should remain in the plaintiffs until the cotton was paid for.—See 117 Mass. 23; 3 Otto, 583; 55 N. Y. 456; 58 N. Y. 73; 40 N. Y. 314; 5 Gray, 306; 24 Conn. 427; Benjamin on Sales, 302-3; 15 Am. Reports, 697. Nothing done or said by plaintiff, authorized any one to suppose that they had parted with their title. The order to the warehousemen was simply to deliver the cotton to the railroad company. It was merely a change of the location; the legal effect of this order was, that wherever the cotton was sent it should remain the cotton of the plaintiffs. It did not even vest Foster with the possession. No authority was given in that order to send the cotton any where as *Foster's cotton*. This order was consistent with the terms of the contract of sale, and that the warehousemen misunderstood it is no fault of the plaintiff. The statement in it, that Foster would pay the storage, did not authorize the warehousemen, or the railroad company, to suppose the cotton was Foster's. Besides, neither the railroad company nor Williams, Johnson & Co. ever saw the order, and hence neither of them could have been influenced by any thing contained in it; they dealt with Foster at their own peril and must take the consequences of their over-confidence in him. The charges given at the request of the railroad company are clearly erroneous; they left the construction of the order to the jury, while it is evidently the duty of the court to construe all written instruments. The eighth charge was clearly wrong. It affirms that, to maintain this action, plaintiffs must have paid or offered to pay a charge on the cotton which they did not know existed, and of which nobody but the company knew any thing. Besides, the company never informed plaintiffs that such a charge existed, and they can not set up such a claim; unless they made it known and refused the demand for possession on that ground.—See 10 Ala. 588. There was no plea setting up this claim or defense. What amounts to the general issue was pleaded, and this question was not an issue to be tried. So, where the defendant pleads and sets up title on the merits, no demand at all is necessary to be proved.—1 Brick. Dig. 575, §§ 73, 75, 76; 13 Ala. 370; 24 Ala. 184. The railroad company based their refusal on another and essentially different ground, and they can not seek to evade the consequences of their refusal by setting up rights which, if they existed at all, were known only to them and which they did not assert. It is evident these charges misled the jury and caused a wrong verdict.

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R. H., R. I. & G. L. SMITH, *contra*.—It is clear that if the plaintiffs so acted in regard to the cotton, as to induce others to lay out their money under the honest belief that it was the property of Foster, they can not recover. This proposition is settled by *Sumner v. Woods*, 52 Ala. 94.—See 1 Selden, 41; 14 Searg. & Rawle, 214; 4 Mass. 403; 6 John. Chy. 437; 3 Duer, 341. Plaintiffs, by their acts and the acts of their authorized agents, (book-keeper and warehouseman), made admissions, upon the faith of which Williams, Johnson & Co. have acted *bona fide* and without notice, and laid out their money, and the plaintiffs are concluded by these admissions.—21 Ala. 424; Benj. on Sales, 721; 19 Ala. 436; 16 Ala. 175; 22 Ala. 548; 1 Greenl. Ev. § 207; Herman on Estoppel, 337; Story on Sales, § 313, p. 343-5, and authorities in note 3. Conceding that the sale was in its inception conditional, and did not pass any title *suo proprio vigore*, still plaintiffs by their acts gave Foster the *indicia* of property, and thereby enabled him to deceive Williams, Johnson & Co. into trading with him on the faith of such ownership. Under these facts, the plaintiffs could not recover, and the charge of the court left these facts fairly to the jury. The warehouseman was the agent of plaintiff, first, to keep the cotton, and second, to deliver it pursuant to their order. If the warehouseman was plaintiff's agent, it was his duty to construe the order given by plaintiffs, and in the absence of plain words to the contrary, the railroad company was justified in accepting the construction of the warehouseman. The order says in plain words, deliver to the M. & O. R. R. The order does not say for whom, but it connects but one person with the paper, and that was A. J. Foster. It directs Foster to exercise an act of ownership, viz: pay storage. The railroad company could draw but one inference, viz: that it was to be delivered to the party who alone was known to it as having any power to exercise any act of ownership, and on this ground it was justified in giving its railroad receipt to Foster. This power to possess himself of the *indicia* of ownership, was given to Foster by the appellants, and they can not complain if he used it to their damage. They enabled Foster to deceive Williams, Johnson & Co., and as against them they can assert no claim to the property.

It is claimed that the charges given by the court are erroneous, because they leave to the jury the construction of the order given by plaintiff, while it was the duty of the court to have construed it. Had appellants asked a charge construing the order, which asserted a proper construction, it would have been error for the court to have refused it; but it surely will not be insisted that a court errs and is subject

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to reversal every time it omits a charge, which, if given, would have been correct. It is the duty of the court to construe any written instrument when called on by either party to do so; but it certainly commits no error when, in the absence of any request, it fails to do so.

BRICKELL, C. J.—It is not necessary to inquire whether the rules of the board of trade, at Columbus, had existed so long, were so generally known, and acted on, that they would be regarded as a custom or usage, entering into and forming a part of contracts for the sale of cotton there made, which were not in stipulation inconsistent with them. Of the character of these rules, Foster was informed by the plaintiffs, and that the proposed sale, or agreement to sell, made with him, was made in reference, and subject to them, and that while he would be allowed to examine, and, if he desired, to re-weigh the cotton, the title would not pass, the sale was not complete, and he could not ship or remove it, until the price was paid. Without dissent, Foster proceeded with the agreement, and these rules thus become parts of it, as completely as if the agreement had been reduced to writing, and they had been expressed as terms of it. To constitute a sale, the parties must mutually assent, that the property, absolute or general, in the thing sold, shall pass from the vendor to the vendee. There may be propositions which, when accepted and complied with, will ripen into a contract of sale; or, there may be agreements for a sale in the future; or, there may be *executory contracts* for sale, but these do not confer the rights, or impose the obligations, which arise from a contract of sale.—Pars. Mer. Law, 41; *Chamberlain v. Smith*, 44 Penn. St. 431. By the agreement made with Foster, neither the property, nor the right of possession, passed to him; and if, during the time allowed him for examination, and re-weighing, if he desired to re-weigh, or at any time before the payment of the price, the cotton had been lost, or from any cause had perished, the loss would have fallen, not on him, but the plaintiffs. The agreement conferred on Foster a right to the inspection and examination, and re-weighing of the cotton, to ascertain if, in quality and quantity, it corresponded with the representations of the plaintiffs, if it was in fact the thing they proposed selling, and he proposed purchasing. It conferred on him, also, the right, on paying or tendering the price, within the time allowed by the rules of the board of trade, to demand of the plaintiffs a transfer of the ownership and possession. It conferred on the plaintiffs the right to demand the inspection and examination, and re-weighing, if that was desired, and the payment of the

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price, within the time prescribed. A breach of the promise by either party, the other being willing and ready to perform on his part, would have been ground of an action for the recovery of damages. The contract was not, therefore, a *sale*, operating, and intended to operate a change of property, but an *executory agreement for a sale*.

The order given Foster by the plaintiffs, directing the warehousemen with whom the cotton was stored, to deliver it to the appellee, did not change the character of the agreement—did not convert it, from a mere *executory bargain*, into a *sale*, as between the plaintiffs and Foster. If the order had authorized the warehousemen to deliver the cotton to Foster, instead of to the appellee, and had been absolute, without qualification or condition in its terms, whether it would have operated a transfer of the property to him, would depend entirely on the intention with which it was given and received. This intention, as deduced from the agreement between the parties, and the circumstances attending the making of the order, would have controlled its operation.—*Magee v. Billingsley*, 3 Ala. 698; *Bates v. Simpson*, 4 Ala. 305. The agreement between the plaintiffs and Foster, and the circumstances attending the execution of the order, show conclusively that the intention was, not a transfer of the property, nor entrusting to him possession of the cotton, but a mere delivery of it, at the place he selected as most convenient for inspection and examination. It gave him no right or interest in the cotton, distinct or different from that acquired by the agreement, and no authority or power over it, other than that he could have exercised if it had remained in the warehouse. The order is not, however, for the delivery of the cotton to Foster. It is in keeping with the agreement the plaintiffs made with him, by which they retained dominion, property and possession of the cotton, and yet afforded him the opportunity of inspection and examination. The delivery authorized, is to the appellee, and if accepted, the appellee thereby becomes the bailee of the plaintiffs, and not of Foster. The only connection the order indicates that Foster had with the cotton, was to pay the storage to the warehousemen. This, at best, is a very equivocal indication of connection with it; and cannot, with any propriety, be regarded as an *indicium* of ownership, or of authority over the cotton, when found in an order which does not indicate any intent on the part of the plaintiffs to part with the property or the possession, and expressly directs the transfer of custody and possession from a warehouseman, not to Foster, but to another bailee, a common carrier. There is not a word, other than the statement that Foster would pay the storage, to be found in

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the order, which indicates that he has the slightest connection with the cotton. It seems too plain for controversy, when the order is taken, as it must be, in connection with the agreement between the plaintiffs and Foster, and with the circumstances attendant upon its making, that it must be regarded, as the parties intended it, not as changing the ownership or possession of the cotton, but merely as an authority to the warehousemen to transfer it to the warehouse, to the depot, or platform of the appellee. As between Foster and the plaintiffs, the property and possession of the cotton was not changed. Foster acquired no interest in it; his right was by payment of the price, within the time appointed, to acquire property in and possession of it. If the cotton was in his possession, there can be no doubt the plaintiffs would be entitled to recover it from him; or, if in the possession of the appellee, as his bailee, the rights of third persons, not having intervened, the duty of the appellee to surrender it to the plaintiffs, or on refusal, the right of recovery of the plaintiffs would be clear and undoubted. Whatever may have been the doubt, at one time, it is now well settled that the right of the true owner, to recover his property from a bailee, is co-extensive with that he would have if the possession had continued in the bailor. Each and both must yield to the paramount title.—The “Idaho,” 3 Otto. (93 U. S.) 575; *Crowell v. Lehman, Durr & Co.*, 54 Ala. 363.

The general rule of law is, that in the absence of authority, or of property, a sale, or a pledge of chattels, confers no title, even when the person making it is in possession, and the person to whom it is made pays a valuable consideration or advances money in good faith, and without notice of the right or title of the true owner.—1 Smith Lead. Cases (5th Am. ed.), 892–3; *Benjamin on Sales* (1st Am. ed.), 4; *Banard v. Campbell*, 55 N. Y. 456; *Saltus v. Everett*, 20 Wend. 267; *Stanley v. Gaylord*, 1 Cush. 536. The rule is embraced in the maxim: *Nemo plus juris ad alium transferre potest quam ipse habet*—*Nemo dat quod non habet*. There are cases recognized as exceptions to the rule.

The first of these, material to be noticed under the facts of this case, and the instructions to the jury, is that of an immediate sale, followed by possession in the vendee, with a condition annexed that, if he fails at a future day to pay the price, the vendor may reclaim the goods—or an immediate sale, followed by possession in the vendee, with an agreement that the title shall remain in the vendor until the price is paid. Not, perhaps, following the current of authority, this court has, in this class of cases, held, that a purchaser

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from the vendee, while in possession, paying a valuable consideration, and without notice of the condition annexed, or of the agreement, would acquire a title that would prevail over the right of the vendor. The condition, or the agreement, is valid and operative, as between the vendor and vendee, and would be enforced if the rights of a subsequent *bona fide* purchaser had not intervened.—*Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, *ib.* 572. This class of cases is wholly unlike the present. Here there is no contract of sale, no transfer of property or of possession. There is, as we have said, at most, but an *executory agreement* for a sale. The reason lying at the foundation of the decisions to which we have referred is, that the transaction between the parties is, in effect, a mortgage—the reservation of the condition, or the stipulation, that the title should remain in the vendor, being intended as a security for the payment of the price. The recognition of such a reservation, or of such a stipulation, as superior to the right of the subsequent innocent purchaser, would offend the policy of our registration laws, and open a door for the perpetration of frauds. The exception in itself imports that there has been a *sale*, and a change of possession—a delivery by the vendor to the vendee, as a completion of the sale, putting the thing sold at the risk of the vendee.—*Lehigh Co. v. Field*, 8 Watts & Serg. 232; *Lester v. McDowell*, 18 Penn. St. 91; *Chamberlain v. Smith*, 44 Penn. St. 431.

Another class of cases, said to be exceptions to the general rule, that “no one can transfer to another a better title than he has himself,” is where the owner, *with the intention of sale*, parts with the property, though under such circumstances of fraud as would authorize him to reclaim it from the vendee. In this class of cases it is very accurately said: “We must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his possession, induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in and the possession of the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter cases.”—Benjamin on Sales (1st Am. ed.), 319. This case certainly does not fall within the exception. The plaintiffs did not part, or intend to part, with the property in the cotton, until the payment of the price; and Foster did not contract for it until he made the payment—until that event, property and possession remained with the plaintiffs. If the order to the

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warehouseman could be regarded as an authority to Foster to take possession, it was a possession for the mere purpose of examination and re-weighing; and it was obtained by fraud. This mere possession clothed him with no right or interest in the cotton, which he could transfer to another. If there had been a *sale*, an intentional transfer of the property in the cotton to him, though it was induced by fraud, the right of a *bona fide* purchaser from him would prevail, because he was clothed with the title. True, the contract would have been voidable at the election of the plaintiffs—it would not have been void. The plaintiffs could have affirmed it, on discovery of the fraud, and have pursued him for the price; or, they could have claimed its rescission, and pursued the cotton. Until they disaffirmed, and claimed the rescission, the title of course would have remained in Foster; and if, in the meantime, he had sold or pledged to one innocent and ignorant of the fraud, the title would pass to him. *Hoffman v. Noble*, 6 Metc. 73; *Moody v. Blake*, 17 Mass. 23.

Another class of cases forming an exception to the general rule, is, when the owner, by his own act or consent, has given another such evidence of the right to sell, or otherwise dispose of his goods, as according to the customs of trade, or the common understanding of the world, usually accompanied the authority of sale, or of disposition. Then, if the person entrusted with the possession of the goods, and with the *indicia* of ownership, or of authority to sell, or otherwise dispose of them, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner. He ought to bear the loss which may follow from his misplaced confidence, rather than the *bona fide* purchaser, who relied on the evidence of property, or of authority with which he clothed the possessor. It is within this exception this case is supposed to fall. The argument is, the order given by the plaintiffs to the warehousemen indicated that Foster had the ownership of the cotton, or, at least, authority to control and direct its shipment. By the order, the warehousemen were induced to deliver the cotton to the appellee, as the property, or on account of Foster; and the appellee was induced to give him the bill of lading, which Williams, Johnson & Co. accepted as security for the bill of exchange discounted by them. This exception does not arise merely because the true owner entrusts another with the possession of his goods. Possession is *prima facie* evidence of the ownership of all species of personal property. It is but *prima facie*, and whoever deals alone on the faith of it must accept it as such, and in subordination to the paramount title, which would prevail over it, if the

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possession was not changed by the transaction into which he enters. If this was not true, a felon acquiring possession by theft, could, by a sale to an innocent purchaser, divest the true owner of his property. A naked bailee, entrusted with possession, could dispose of goods to the prejudice of his principal. A case does not fall within the exception unless the owner confers on the vendor *other evidence of ownership, or of authority to dispose of the goods, than mere possession.*—*McMahon v. Sloan*, 12 Penn. St. 229. The case of *Andrew v. Dietrich*, 14 Wend. 31, is an illustration. An auctioneer who had dealt with the tenant in possession of a house in which the carpets were down, under the belief that he was the owner of the carpets, and had advanced money on the faith of his ownership, acquired no right or title as against the true owner, who had delivered them to the tenant, under an executory contract for sale at so much per yard. In *Covill v. Hill*, 4 Denio, 323, the principle is affirmed that the mere possession of goods, without some other evidence of property, or of authority from the owner to sell, will not enable the possessor to transfer a better title than he has himself. The plaintiff was the owner of a lot of lumber lying on the bank of the canal, which he agreed one Potter might ship in his, the plaintiff's name, to the defendants at Albany to sell, and that when sold, the plaintiff should receive a certain sum per thousand feet, and Potter the remainder, if any, of the proceeds of sale—the title and possession to remain in the plaintiff till he was fully paid. The transaction between the plaintiff and Potter was treated as a bailment, and it was held the defendants acquired no title by the purchase from Potter. In *Saltus v. Everett*, 20 Wend. 267, there was a sale of lead by a person in possession, having a bill of lading indorsed in blank, and other written evidence of property he had fraudulently obtained, and the sale was held inoperative to divest the true owner of his title. In all cases, which have been deemed to fall within this exception, the owner has done some act, other than parting with possession, of a nature to mislead persons as to the title. The case of *Pickering v. Busk*, 15 East, 38, has been considered as carrying the exception to its limits. There the owner of hemp lying at the wharf had it transferred on the wharfinger's books into the name of a broker whose business was that of buying and selling hemp; and though he gave the broker no authority to sell, it was held, a sale by him to an innocent purchaser passed the title. Lord Ellenborough said: "Strangers can only look to the acts of the parties, and the external *indicia* of property, and not the private communications which may pass between a principal

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and his broker; and if a person authorize another to assume the apparent right of disposing of his property in the ordinary course of trade, it must be presumed the apparent authority is the real authority."

The order to the warehousemen is the only evidence of ownership, or of a right to possession, which Foster had or the plaintiffs conferred. This order cannot be regarded as an evidence of the transfer to him of either possession or of property. It was not calculated to induce others to deal with him as the owner, or as having authority to dispose of the cotton. By it the plaintiffs, in effect, assert their ownership and authority, and designate the appellee, not Foster, as the person to whom possession or custody of the cotton was to be delivered. The order does state the ship mark of the cotton, and this, with its delivery to the appellee, may have indicated that transportation by the appellee was intended. If it indicates that intention, there is nothing to indicate that the plaintiffs did not intend the shipment should be on their own account, or that they would not give instructions, subsequently, as to the consignee, the place of destination, or on whose account, and as whose property it was to be transported. There is no indication that Foster had, in these respects, the slightest authority. It is not material what construction the warehousemen or the appellee may have placed on the order. If they construed it as an evidence of a transfer of property to Foster, or as conferring on him authority, they adopted that construction at their own peril; and their misconstructions can not prejudice the plaintiffs. The expression that Foster would pay the storage is, as we have said, to say the least of it, very equivocal as indicating that he had any connection with the cotton. If this expression created a conjecture that he was connected with it, its uncertainty ought to have put the warehousemen and the appellee on the inquiry, and inquiry would have rendered it impossible that they should have been misled. Not inquiring, when ordinary prudence would have suggested inquiry, they must take the consequences of their dealing with one who had no authority over the cotton. Nor have Williams, Johnson & Co. acquired any right in or to the cotton. The bill of lading erroneously given Foster by the appellee, cannot deprive the plaintiffs of their property. Its transfer by indorsement would have passed no more than the right and title of Foster, if any he had, and if its transfer by delivery passed an equity courts of law would recognize and protect, it is an equity resting only on that right and title, not on the property of the plaintiffs.—*Saltus v. Everett*, 20 Wend. 267.

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When the cotton was demanded of the appellee, the plaintiff tendered payment of the freight, but not of storage, which it seems the appellee had paid the warehousemen. The appellee did not inform the plaintiffs of the payment of the storage, but placed its refusal to surrender possession on no other ground than that it would surrender only to the consignees or the person holding the receipt given for its transportation. We do not intend to express an opinion on the right of the appellee, in any event, to have demanded of the plaintiffs payment of freight or storage, as the condition on which they would surrender the cotton to them. If the appellee had that right, it ought to have been asserted when the demand was made. Not then asserting it, but placing their refusal on the sole ground that the plaintiffs were not the consignees, or had not possession of the receipt for transportation, they must be deemed to have waived it. They cannot now defeat the suit they have compelled, by asserting a lien the plaintiffs could have removed if knowledge of it had not been withheld from them.—*Spence v. McMillan*, 10 Ala. 533.

It is obvious from what we have said, that the instruction numbered three, is abstract, if it asserts the law correctly, and that the remaining instructions are erroneous statements of the law applicable to the facts shown by the bill of exceptions.

The judgment must be reversed, and the cause remanded.

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Bill in Equity for Specific Performance.

1. *Specific performance; when will not be decreed.*—In 1854, S. gave a writing to L. & N. acknowledging the receipt of \$200 in part payment of "ten acres of land," sold by S. to L. & N. at \$700, the writing also stating "the balance of the money due me, is to be paid when I can give them satisfactory titles, which I bind myself and my heirs to do." This writing was attested by two witnesses. Shortly afterwards L. & N. entered upon ten acres of land of which Schuessler was in possession, and occupied and used it until the year 1871, when they sold the fences and left the land vacant, and Schuessler re-entered. Although Schuessler could not produce a satisfactory paper title, his claim was not unfounded, and no fraud was charged against him. In the year 1872, the property having increased in value to \$2,700, the representatives of L. & N., who had died in the meantime, tendered S. \$500, or that sum and one year's interest, for the land, but did not tender a conveyance. S. refused, unless they would pay interest, or the value of the use and occupation, which was shown to be \$150 per annum. Thereupon the heirs and representatives of L. & N. filed their bill to compel specific performance. *Held:*

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The purchasers had as beneficial use of the land as if a conveyance had been made; and after fifteen years undisturbed use and occupation, it was not equitable to compel S. to part with the land, which had greatly increased in value, upon payment to him of only the principal of the purchase-money, without interest or compensation for the use and occupation.

2. The fact that a small portion of the purchase-money was paid, did not alter the case, and complainants only offering the principal and one year's interest, and refusing to pay for the use of the land, and not offering to do what the court might consider ought to be done, their bill ought to be dismissed.

APPEAL from Montgomery Chancery Court.

Heard before Hon. HUIOSCO AUSTILL.

This was a bill filed by the appellants, the administrator and heirs of Julius Norton and Henry Lee, deceased, against the appellee, Schuessler, to compel specific performance of a contract to convey certain lands, made with said Lee and Norton in their life time, the facts of the case being thus:

In 1854 appellant, Schuessler, being in possession of land adjoining the city of Montgomery, entered into a contract for the sale of ten acres to Lee and Norton, of that city, and executed to them a writing, as follows:

"Received, Montgomery, April 6, 1854, of Lee & Norton, a negro man by the name of Jack, valued at two hundred dollars, in part payment of ten acres of land sold by me to Lee and Norton at seven hundred dollars, and the balance of the money due me is to be paid when I can give them satisfactory titles, which I bind myself and my heirs to do." This was signed by Schuessler and attested.

Within three to five months afterwards, Lee and Norton took possession of a parcel of ten acres of land, which had been previously in the possession of Schuessler, and retained the possession and use of it for pasturage until about the beginning of the year 1871; when, according to the testimony, the fence that was around the land was sold by them, the boards and posts pulled down and carried away, and the land left vacant; after which Schuessler retook possession of it, and has ever since retained it.

The negro mentioned in the receipt was an old man; the land was used for the pasturage of cattle; and the only testimony as to the value of the use of it, is, that it was worth annually, on an average, about \$150, (which is, doubtless, an excessive valuation,) and that its total value when the suit was brought in April, 1873, owing to the improvement and enlargement of the city, was about \$2,500.

Both Lee and Norton died in 1871, Norton in September. In January, 1872, a son-in-law of Norton, on behalf of the estates of both Lee and Norton, offered to Schuessler to pay him \$500, or \$500 and one year's interest thereon, for the

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land, as the balance of the price due for it, and tendered to him the money; which he refused to take unless they would pay him interest for the time they had had possession, or the value of the use and occupation; but no conveyance thereof was prepared and tendered to him to be executed; and he remained in possession of the land. This was the first action taken on either side with a view to perfect the title. About fifteen months afterwards this suit was brought by the administrators and heirs of both Lee and Norton, by a bill for a specific performance of the contract. And the Chancellor decreed that, upon plaintiffs' paying into court \$500, without interest, Schuessler should execute to them quit-claim deeds.

ELMORE & GUNTER, for appellant.

SAYRE & GRAVES, and D. CLOPTON, *contra*.

MANNING, J. (after stating facts.)—The writing signed by Schuessler says nothing about possession being delivered of the undescribed ten acres. Although it may be inferred from the fact that the old negro man was then given in part payment, and from the further fact that possession was, in a few months afterwards, taken by Lee and Norton without objection, that they did not, in doing so, violate the contract as it was understood by the parties, yet it was not stipulated in the writing that the vendees should have possession. But these facts and the further one that the land is not described in the writing, which is quite defective as a title, tend to prove that the parties considered the transaction as a cash sale, and expected it to be completed in some short time thereafter. An informal and meagre memorandum, insufficient in itself, and signed by only one of the parties, could not have been intended, when made, to continue long the only evidence of their respective rights. There is no pretense that Schuessler falsely claimed that the land was his, although he could not produce satisfactory paper titles; and by virtue of their agreement with him, Norton and Lee obtained the possession and had the beneficial use of the property for a period of fifteen years, with as much advantage as if they had received from him a perfect deed, conveying the legal title.

Is it allowable in a court of equity and in a suit for specific performance of a contract, in respect to which the court has a certain legal discretion, to insist, that under such circumstances, complainants are entitled to a decree for a conveyance, because the writing signed by defendant says—"the

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balance of the money due me, is to be paid, when I can give them satisfactory titles, which I bind myself and my heirs to do"? What is "the balance of the money due" to him then, according to equity principles, from vendees who have had uninterrupted enjoyment, for a long time, of the premises bargained for?

Sugden, in his work on Vendors and Purchasers, says on this subject: "If no time be limited for the performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase-money from that time."—(p. 795).

In *Fludyer v. Cocker*, (12 Ves. 25,) part of a farm had been allotted, in lieu of tithes, to an impropiator, who agreed to sell it to the owners of the farm, for a price to be paid at a short day, (which was named,) *on a good title being made and executed*; and the possession remained in the purchaser undisturbed, who paid no tithes; but for want of an award, by commissioners who were to make the allotment, twenty-seven years elapsed before a good title could be made. Sir William Grant, Master of the Rolls, ordered that the purchaser pay interest from the day fixed for completing the contract. That learned equity judge said: "At law the purchaser could not have the right to the estate, nor the vendor to the money, until the conveyance was executed. But this has nothing to do with the mode in which this court executes the agreement. The purchaser might have said he would not have any thing to do with the estate, until he got a conveyance. But that is not the course he took. He enters into possession. * * He proceeds upon the supposition that the contract will be executed, and, therefore, agrees that from that day, he will treat it as if it was executed."

The present case differs from the one cited, in the particular that \$200 of the price was paid when the writing was signed; which might be considered as entitling the buyers to a corresponding present benefit from the property. But this could not give them a right to fifteen years enjoyment of it—and then to a conveyance of the fee-simple, after the property had greatly increased in value, upon payment of \$500, balance of the principal, without any interest.

We need not consider this case in any of its other aspects. A court of equity is applied to for its decree to compel a vendor specifically to perform a contract nineteen years after it was made, in favor of purchasers, who not only do not offer to do what this court may consider ought to be done in respect to interest on the price, to compensate for their long use of the property bargained for, but who must be understood as distinctly declining to pay any interest.

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We think, in view of the principles which regulate the exercise of equity jurisdiction in such cases, the Chancellor erred in rendering a decree in favor of complainants; and it must be here reversed, and the bill be dismissed, at the costs of appellees in this court and in the court below.

STONE, J., not sitting.

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Action by Personal Representative to recover Damages for Assault and Battery on Decedent.

1. *Action; what does not survive, and can not be enforced by attachment.*—The personal representative can not institute or maintain any action to recover damages for an assault and battery upon the decedent in his life-time; such a cause of action does not survive, and attachment will not lie at the suit of the administrator to enforce it; nor can such attachment, at the suit of the personal representative, be maintained under the "act to prevent homicides," approved February 5th, 1872—the assault and battery not being shown to be the wrongful act of defendant, causing death; nor can such proceeding be amended so as to make it conform to that statute.

APPEAL from Circuit Court of Baldwin.

Tried before HON. H. T. TOULMIN.

The appellee, Elizabeth Bryars, as administratrix of Green B. Bryars, deceased, commenced this suit by attachment against James Hadley, Sr., and the other appellants. In the affidavit for attachment, it is stated that the appellants "are indebted to Elizabeth Bryars, as administratrix, as aforesaid, in damages for an assault and battery on said Green B. Bryars, deceased, in the sum of twenty thousand dollars," &c. The attachment bond and the writ of attachment, both describe the cause of action as an indebtedness from defendants to plaintiff as administratrix, &c., amounting to twenty thousand dollars. The attachment having been levied on property of the defendants, the plaintiff, as administratrix, &c., filed a complaint, claiming damages in the sum of twenty thousand dollars "for a wrongful assault and battery by said defendants, unlawfully committed, with force and arms, upon the body of said Green B. Bryars, in his life time, to-wit, July 19th, 1875, by reason of which wrongful act the death of said Green B. Bryars was then and there caused." The complaint averred that if Bryars had lived he could have maintained the action. The defendants moved to strike the

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complaint from the files on the ground that it was a departure from the cause of action stated in the affidavit, and also pleaded in abatement that the cause of action disclosed in the affidavit and writ was not one which survived or could be enforced by attachment; and also moved the court to dissolve the attachment on the same grounds. Demurrers were sustained to the plea in abatement, and the court overruled the motions to quash and dissolve the attachment, and defendants excepted, and by agreement of opposing counsel, under § 3486 of the Revised Code, appeal, and here assign these rulings as error.

ALEX. MCKINSTRY, for appellant.

THOS. H. PRICE, *contra*.

STONE, J.—The action in the present case is brought by the personal representative of Green B. Bryars, deceased, to recover for an alleged assault and battery on him in his lifetime. There is nothing in the affidavit, bond or attachment, which tends, in the slightest degree, to show that the said alleged assault and battery caused the death of the said Green B. Bryars. Nor does either of said papers conform to the requirements of the act “to prevent homicides,” approved February 5, 1872, Pamph. Acts, 83, or show that the action was brought under that statute. The record presents the naked case of a suit brought by an administratrix to recover damages for an assault and battery committed on her intestate; the suit being brought after his death. At common law, actions for injuries to the person could not be maintained after the death of the person injured. *Actio personalis moritur cum persona*.—3 Blackst. Com. 302; 1 Chit. Pl. 68; 1 Brick. Dig. 13, §§ 192, 193. Such actions are not within the healing provisions of our statute, which declares that certain actions “survive in favor of and against personal representatives.”—Code of Ala. § 2920. It follows from this that no action can be maintained at law on the facts set forth in the attachment proceedings; and the attachment should have been dissolved on the motion of the defendant.

The “act to prevent homicides,” approved February 5, 1872, declares a new right, and provides a remedy for its enforcement. To bring a case within its provisions, the pleadings, or attachment proceedings, as the case may be, must show that the action is founded on the wrongful act or omission of defendant, which caused the death of plaintiff’s testator or intestate. Less than this does not come up to the requirements of the statute.—See *South and North Ala-*

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bama Railroad Co. v. Sullivan, at present term. The right under that statute being of its own creation, and the proceedings in the present record falling fatally short of its requirements, this suit can derive no aid from it. Nor is the defect one that can be remedied by amendment.—Code of Ala. § 3315.

The judgment of the Circuit Court is reversed; and this court, proceeding to render the judgment which that court should have rendered, doth order and adjudge that the attachment in this cause be dissolved, and the suit dismissed at the cost of the plaintiff therein.

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Action on Account.

1. *Discontinuance; what does not operate as.*—Where suit is brought in the name of two persons, claiming, as late partners, under a firm name for goods sold defendant—there being nothing to show that the plaintiffs had different interests in the debt—the suit, on the death of one of the plaintiffs, should be prosecuted in the name of the other as surviving partner; making the executor of one of the deceased partners a plaintiff with the other, creates a misjoinder of parties plaintiff, for which a demurrer would lie, but does not operate a discontinuance; neither is the cause discontinued by amendment striking out the name of the other partner, and leaving the executor of the deceased partner the sole plaintiff.

2. *Charge; what error to refuse.*—In such case, the executor of the deceased partner being the sole plaintiff, and the complaint containing no appropriate allegations of ownership in him, it is error to refuse to instruct the jury, at defendant's request, that the plaintiff cannot recover for goods sold and delivered by the late firm.

3. *Amendment; when will not be presumed.*—The appellate court will not presume that an amendment of pleadings, shown to be necessary by the proof, was made, when the party omits to ask leave to amend, after the defect has been brought to his notice, by objection raised in the court below.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

B. A. Weems and L. H. Weems, as late co-partners under the firm name of B. A. Weems & Co., brought suit against appellant, Davidson, to recover the price of goods sold to him by the late firm. Davidson appeared and pleaded. Afterwards, the plaintiff suggested the death of B. A. Weems, and on motion, his executor, E. R. Weems, was made a party plaintiff in his stead. "On the calling of the cause, the plaintiffs having announced ready, the defendant suggested that the cause had been discontinued by the change of parties, and moved the court to make an order to that effect,

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which motion was overruled, and defendant excepted." The plaintiffs were then allowed, against the objection and exception of defendant, to strike out the name of L. H. Weems, as a party plaintiff."

The above is all that is shown by the record or bill of exceptions as to these amendments, and there is nothing to show that the allegations of the original complaint were in anywise amended, save as above stated.

The defendant then moved the court to strike the cause from the docket, on the ground that it had been discontinued by the change of parties; but the objection was overruled, and defendant excepted.

The evidence showed that defendant's indebtedness arose from a sale of goods to him by the firm of B. A. Weems & Co., composed of B. A. and L. H. Weems; that the firm was dissolved before suit was brought; that B. A. Weems afterwards died; that plaintiff, E. R. Weems, was his executor, and that L. H. Weems was surviving at the time of the trial. The court, against the objection and exception of defendants, permitted the plaintiff to prove that the claim sued on was the sole property of B. A. Weems at the time suit was brought, the firm having dissolved, and the accounts, by agreement between the late partners, having been turned over to B. A. Weems.

The defendant requested the court, in writing, to charge the jury as follows: "If the account sued on was contracted with the firm of B. A. Weems & Co., composed of B. A. and L. H. Weems, and L. H. Weems is now the surviving partner of that firm, then, under the complaint in this case, the plaintiff, as executor, can not recover." The court refused to give this charge, and defendant excepted.

The refusal of the motions to enter a discontinuance, and to strike the cause from the docket, on the ground that it had been discontinued, and the refusal to give the charge requested, are now assigned as error.

ANDERSON & BOND, for appellant.—The change in parties by striking out L. H. Weems, and substituting the executor of B. A. Weems, in his stead, left the plaintiff asserting a claim for goods sold by B. A. Weems alone. The complaint follows the form in the Code where the plaintiff declares directly on an account contracted with himself; and not as an assignee or transferee. On its face, then, the complaint did not show any such transfer, nor did it contain an averment that the claim was the property of the plaintiff. This was necessary to enable plaintiff to recover under the circumstances disclosed in the record. Not containing any

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proper averment as to ownership, &c., the plaintiff was confined to proof of an account contracted with him. Evidence of a contract made with some one else, and transferred to him, was without the cause of action stated. The refusal of the charge asked by defendant was plainly erroneous.

The amendments effected a change of the cause of action, and presented a different issue between different parties; thereby the suit was discontinued.

BOYLES & OVERALL, *contra*.—There was no discontinuance. Parties were still before the court, capable of prosecuting the suit. The defendant and the cause of action, remained as before the amendment. When L. H. Weems' name was stricken out, it was an admission that he had no interest in the suit. The original plaintiffs were then represented before the court by the executor of one of them, and the same defendant and same cause of action were before it. The alleged defects in the complaint could be reached only by demurrer, and not by motion to enter a discontinuance. Defendant not having demurred, but gone on and treated the complaint as a good one, it is too late now to seek a reversal for its defects.—Rev. Code, § 2808. On a statute, similar in every respect to section 2808 of the Code, it has been repeatedly held, that "upon appeal, the court may treat the pleadings as amended in conformity to the evidence, in any respect in which an amendment ought clearly to have been allowed."—40 Barb. 237; 1 Kernan, 237; 19 Barb. 331; 21 N. Y. 305.

MANNING, J.—The action in this cause was brought by B. A. Weems and L. H. Weems as late co-partners under the firm name of B. A. Weems & Co., for the price of goods alleged to have been sold by plaintiffs to defendants. And there was nothing in the complaint to show that one of them had any more interest in the sum sued for than the other. Therefore, upon the death of B. A. Weems, the right to prosecute the suit devolved upon L. H. Weems alone, as the surviving partner. According to law, and the statement of facts contained in the complaint, no other person was then entitled to maintain the action.

But the making of the executor of B. A. Weems as his representative, a co-plaintiff with L. H. Weems, was not a discontinuance of the suit, and the motion to have it so ordered was properly overruled. By the change there was only a misjoinder of parties plaintiff, for which, if not corrected, a demurrer would lie. Nor was the alteration subsequently effected by the striking out of the complaint the

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name of L. H. Weems as a party and leaving that of B. A. Weems as the sole original plaintiff, now represented by his executor, a discontinuance of the action. There were parties in court and a claim prosecuted. If, as appellants' counsel argue, the complaint then showed that the right to sue for this claim was not in the executor of B. A. Weems, but in L. H. Weems, as surviving partner, a demurrer for that cause might have been sustained, but not the motion for an order that plaintiff had discontinued his suit. *Non constat* that the complaint would not be amended so as to show a right of action in the executor alone. This might have been done in such a case, by an averment that at the time of bringing the suit, B. A. Weems was the person really interested in the sum sued for and solely entitled to have the same.—§§ 2523 *et seq.* of the Revised Code of 1867.

The judge of the City Court erred, however, in not giving the charge asked, to the effect that under the allegations of this complaint, the plaintiff was not entitled to recover in this action, for goods sold by the firm of *B. A. Weems & Co.*, of which L. H. Weems was surviving partner. To authorize a recovery by the executor in such a case there should have been an averment that B. A. Weems was the owner of the claim sued on, when the suit was brought, and the party really interested therein.—*Browder v. Gaston*, 30 Ala. 677; *Douglass v. Beasley*, 40 *id.* 242.

This court cannot consider an amendment as made, which counsel decline or omit to ask leave to make, when their attention is regularly directed to the matter of it by objections made on account of the defect, in the course of the proceedings at the trial.

Let the judgment of the City Court be reversed and the cause be remanded.

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Indictment of White Person and Negro for Intermarrying.

1. *Constitutional law; § 4189 of Code, validity of.*—Section 4189 of the Code, which makes it an offense for a white person and negro to intermarry, and inflicts upon persons of the different races living together in adultery, equal, though severer punishment than where that offense is committed by persons of the same race,—is a valid law of this State, and not violative of the Constitution or laws of the United States. (Overruling *Burns v. The State*, 48 Ala. 195.)

2. *Marriage; power of State over.*—Marriage is not a mere contract, but a

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social or domestic institution, upon which are founded all society and order, to be regulated and controlled by the sovereign power for the good of the State; and the several States of the Union, in the adoption of the recent amendments to the Constitution of the United States, designed to secure to citizens rights of a civil or political nature only, did not part with their hitherto unquestioned power of regulating, within their own borders, matters of purely social and domestic concern.

APPEAL from Circuit Court of Butler.

Tried before Hon. JOHN K. HENRY.

The indictment in this case charged, that before the finding thereof, "Aaron Green, a negro man, and Julia Atkinson *alias* Green, a white woman, did intermarry with each other against the peace," &c.

The defendant, Julia, demurred to the indictment, on the ground that it charged no offense; but her demurrer was overruled, and the trial proceeded on plea of not guilty. The bill of exceptions recites, "the facts were undisputed and admitted by the defendant, which established all the allegations of the indictment. It was further admitted, and undisputed by the defendant, that the marriage took place in Butler county, Alabama, on the 13th day of July, 1876. Thereupon, the court charged the jury, if they believed the evidence, they must find the defendant guilty. The defendant excepted to this charge."

The jury found the defendant guilty, and the court thereon sentenced her to imprisonment in the penitentiary for two years, and she appealed.

P. O. HARPER, for appellant, cited and relied on the case of *Burns v. The State*, 48 Ala. 195.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The case of *Burns v. The State*, should be overruled. It is not supported by reason or authority.—See *Ellis v. The State*, 42 Ala. 525, and *Gibson v. The State*, 36 Indiana, 404. This last case contains a very exhaustive discussion of the question.

MANNING, J.—The question this record presents is, whether or not the State may make the marriage of a white person with a person of the negro race, a punishable offense. The statute is as follows: "If any white person and any negro, or the descendant of any negro to the third generation inclusive, though one ancestor of each generation was a white person, intermarry, or live in adultery or fornication, with each other, each of them must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than two, nor more than seven years."—§ 4189 (3602) of Code of 1876.

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This statute was assailed, so far as it concerned the living "in adultery or fornication," of a man and woman of the different races, in *Ellis v. The State*, 42 Ala. 525, and *Ford v. The State*, 53 Ala. 150. For the like offense between a man and woman of the same race, a penalty less severe was denounced.—§ 4184 (3598). And this inequality of punishment was supposed to bring the section first quoted above, into conflict with the "civil rights act" of congress, enacted to prevent certain discriminations against persons of African descent, on account of race, color or previous condition of servitude. But this court, in both the cases, held the law in question to be valid.

In *Burns v. The State*, (48 Ala. 195,) according to the 4th head-note, the decision in *Ellis v. The State* (*supra*), was overruled. *Burns*, a justice of the peace, had as such performed the rites of matrimony between a white person and a negro, contrary to a statute; and having been convicted of and fined for the offense, our immediate predecessors reversed the judgment; holding, that the section first above cited and that under which the conviction was had, were in conflict with the act of congress referred to, and therefore void.

The argument in support of this decision was as follows: "Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens—means the right to make and contract which a white citizen may make. The law intended to destroy the distinction of race and color, in respect to the rights secured by it." And again: "One of the rights secured by citizenship, therefore, is, that of suing any other citizen. The civil rights bill now confers this right upon the negro in express terms, as also the right to make and enforce contracts," [neither of which was ever denied to a free person of any color, in the courts of this State,] "amongst which, is that of marriage with any citizen capable of entering into that relation."

This seems to us a very narrow and an illogical view of the subject. And it might, perhaps, be a sufficient answer to it to say: What the law declares to be a punishable offense, is, marriage *between* a white person and a negro. And it no more tolerates it in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent. There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty. Moreover, at the time of the passage of the so-called "civil rights act," similar laws to those of Alabama existed against such inter-

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marriages in several, perhaps in nearly all, of the Northern States, whose representatives in congress voted for that act; and as no mention was made in the act, or in any other act of congress, of such intermarriages, the presumption is that it was not intended to secure to persons of the negro race any greater rights in those Northern States, or consequently in any other, than they already enjoyed in them. It is apparent, therefore, that the statute of Alabama is not in conflict with the act of congress, if that be consistent to the extent supposed, with the constitution of the United States.

But the subject should be regarded with a broader view. Is marriage, as the argument objected to assumes, nothing more than a civil contract? Is it, "in that character alone," dealt with by the municipal law?

Doubtless, it is by a contract—that is, by the agreement of the parties—that they enter into the state of marriage. But, as was said by the Supreme Court of Delaware, it is a contract "of a peculiar character and subject to peculiar principles. It may be entered into by persons who are not capable of forming any other lawful contract; it can be violated and annulled by law, which no other contract can be; it can not be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it, than from the contract itself."—*Townsend v. Griffin*, 4 Harrington, 440. According to Judge Story: "Marriage is not treated as a mere contract between the parties, subject as to its continuance, dissolution and effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature, of any in society."—*Conf. of Laws*, § 200. Ch. J. Robertson, of Kentucky, said of it: "*As every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and can not, like mere contracts, be dissolved by the mutual consent only of contracting parties, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be subjected to political restraint or foreign control, consistently with the public welfare. And, therefore, marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts.*"—*Maguire*

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v. Maguire, 7 Dana, 181. And Mr. Bishop, (from whose work on Marriage and Divorce, the foregoing extracts are taken, and who insists that marriage is not a contract, but a *status*,) says: "The fact that parties enter into marriage only over the threshold of a contract, furnishes all the foundation there exists for the exceedingly loose definition which terms it a contract."—1 vol. § 12 (36a).

This institution is, indeed, "the most interesting and important in its nature of any in society." It is through the marriage relation that the *homes* of a people are created—those homes in which, ordinarily, all the members of all the families of the land are, during a part of every day, assembled together; where the elders of the household seek repose and cheer, and reparation of strength from the toils and cares of life; and where, in an affectionate intercourse and conversation with them, the young become imbued with the principles, and animated by the spirit and ideas, which in a great degree give shape to their characters and determine the manner of their future lives. These homes, in which the virtues are most cultivated and happiness most abounds, are the true *officina gentium*—the nurseries of States. Who can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred? While with their interior administration, the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from without.

Hence it is, that, if not in every State of the Union, in all of them in which any considerable numbers of the negro race resided, statutes have been enacted prohibiting marriages between them and persons of the white race. Said the Supreme Court of Pennsylvania, in a recent case: "Why the Creator made one white and the other black, we do not know; but the fact is apparent, and the races are distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar.

The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures."—*Phila. & W. Chester R. R. Co. v. Miles*, 2 Amer. Law Rev. 358—(cited in *State v. Gibson*, 36 Ind. 404.)

It depends very much, of course, upon the relative proportions and condition of the two races in any State, whether legislation of the kind in question is necessary there or not.

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It is, also, a fact not always sufficiently felt, that the more humble and helpless families are, the more they need this sort of protection. Their spirits are crushed, or become rebellious, when other ills besides those of poverty, are heaped upon them. And there are (we presume) but few localities any where in the United States, in which the conviction has not obtained, and been approved by minds the most sedate, that the law should absolutely frustrate and prevent the growth of any desire or idea of such an alliance, and all the secret arts, practices and persuasions of servants or others upon the weak-minded or froward, to bring it about—by making marriage between the two races, legally impossible, and severely punishing those who perform, and those who, with intent to be married, go through the ceremonies thereof. Manifestly, it is for the peace and happiness of the black race, as well as of the white, that such laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.

How, then, can it be maintained that the States of this Union, in adopting amendments which make no allusion to such intermarriages, intended to deprive themselves of the important power of regulating matters of so great consequence and delicacy within their own borders for themselves, as it always was their undoubted right to do. In an able and emphatic opinion, the Supreme Court of Indiana unanimously decided, that this had not been done.—*State v. Gibson*, 36 Ind. 389. A similar decision has been lately made in Texas, in a case of *Frasher v. The State*, according to a note in the Central Law Journal, (vol. 6, p. 1). We have not, however, any report of the case. The jurisdiction of the State of North Carolina over the same subject, and the validity of her laws prohibiting such intermarriages, are assumed to be beyond question, by the Supreme Court of that State, in the cases of *The State v. Ross* and the *Same v. Kennedy*, 76 N. C. 242 and 251. And, in a case on *habeas corpus*, before him, Judge DUVAL, a Federal judge, holding the District Court of the United States at Austin, Texas, commenting on the same statute of Texas which was held valid by the Supreme Court of that State, as mentioned above, said: "Marriage between the two races is wholly abhorrent to my sense of fitness and propriety; and I presume it would be no violation of the constitution and laws of the United States—inasmuch as marriage is but a civil contract, to be regulated by the laws of the several States—were the State of Texas now

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to pass a law forbidding such marriages, under penalties extending to both races alike." But he thought the law then under consideration void, "because it would visit a heavy penalty upon a white citizen, and none whatever upon a colored citizen, for doing a certain act."—5 Cent. L. J. 149.

The amendments to the Constitution were evidently designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of a purely domestic nature. The regulation of these belongs to the States. It is a satisfaction to find this recognized, impliedly, in an opinion of the Chief Justice of the United States, announcing the recent decision of the Supreme Court upon the civil rights act of Louisiana. This statute required those engaged in the transportation of passengers to carry colored persons in the same cars, cabins, &c., as whites: And the Supreme Court decided that *so far as it applied to foreign and inter-State commerce, it was void, because the regulation of such commerce was, by the constitution, reserved to the congress of the United States.* Of the statute, the Chief Justice said: "It does not act upon the business, *through the local instruments to be employed after coming within the State*—but directly upon the business as it comes into the State from without, or goes out from within.

. . . . A passenger in the cabin set apart for whites without the State, must, when the boat comes within, share the accommodations of that cabin, with such colored persons as may come on board afterwards, if the law is enforced. . . . The river Mississippi passes through, or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, . . . it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river, or its tributaries, he might be required to observe one set of rules, and on the other another. Commerce can not flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other kept separate."

For these reasons, and to the extent mentioned, the "civil rights" law of Louisiana was declared to be unconstitutional and void.—6 Cent. L. J. 102.

It will be observed, that it is not asserted by the court,
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that congress has any authority over such matters, by virtue of the 14th, or any other amendment to the constitution. Nor is it intimated that those amendments secured the objects which the Louisiana act was designed to effect. On the contrary, it seems to be admitted that but for the clause, which was in the constitution from the beginning, giving to the general government the power "to regulate commerce with foreign nations and among the several States," the States might, respectively, enact such laws as to them should seem expedient in respect to the social intercourse, while traveling, of their own citizens of the two races; and that these laws might be very different on one side of a river or of an imaginary line across it.

No amendment to the Constitution, nor any enactment thereby authorized, is in any degree infringed by the enforcement of the section of the Code, under which the appellant in this cause was convicted and sentenced.

In view of the decision made by our predecessors in *Burns v. The State*, *supra*, which is hereby overruled, we trust that the Executive of the State will find just reasons in this case, why appellant should receive a pardon.

In performance of our duty, the judgment of the circuit court must be affirmed.

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Money had and received.

1. *Compromise, money paid on; when can not be recovered back.*—Money paid in compromise of a doubtful or disputed claim, cannot be recovered back by action for money had and received. Thus, where a judgment creditor, having an execution levied on his debtor's land, in May, 1870 (after the decision of *Hepburn v. Griswold*, 8 Wall. 603, which held the legal tender acts of Congress not applicable to existing contracts), instructed the clerk and sheriff to receive nothing but gold and silver, or its equivalent, in satisfaction of the debt, and refused to receive legal tender notes except at 15 per cent. discount, which was then the premium on gold, and which the defendant refused to pay, but offered to pay them at 10 per cent. discount, which offer the plaintiff finally accepted. *Held*,

That the premium paid could not be recovered, after the overruling of *Hepburn v. Griswold*.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. GEORGE H. CRAIG.

The opinion states the facts.

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PETTUS, DAWSON & TILLMAN, for appellant.—The money was paid in compromise of a doubtful claim, and it cannot be recovered back. The appellee had full knowledge of the facts, and no fraud or imposition was practiced on him. No matter how mistaken he may have been as to his rights under the law, he cannot recover back the money paid and received in compromise of what was considered a doubtful right.—34 Ala. 400. To render valid the compromise of a litigation, it is not necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render the compromise valid that there be a question to be decided between them. A compromise of a doubtful right will not be set aside on any other ground than fraud.—Kerr on Fraud and Mistake, 403; 1 Atk. 10; 2 Ba. & Be. 179; 18 Beav. 87; 9 How. 55; 15 Ala. 149; 1 Allen, 279; 11 Vt. 483; 4 Met. 270; 5 Watts, 259; 1 Jones Eq. 313.

MORGAN, LAPSLEY & NELSON, *contra*.—The sole question in this case is, whether or not the payment of the premium was voluntary or not; we insist that the facts of this case show that the payment made was involuntary. Money paid under execution cannot be said to be a voluntary payment, and where the demand was illegal it can be recovered back in this form of action. This subject is elaborately discussed in *Town Council of Cahaba v. Burnett*, 34 Ala. 407; and in that case it is expressly stated that *money paid upon an execution can be recovered*.—See, also, *Ewing v. Peck*, 26 Ala. 414; *Williams v. Simmons*, 22 Ala. 425; *Cocke v. Porter's Executors*, 2 Humph. (Tenn.) 15; Chitty on Con, 551, and cases cited in notes.

The testimony shows a tender in *U. S. legal tender notes*. The defendant's intestate, and her attorney, had no right to demand anything more.—*Munter v. Rogers*, 50 Ala. 284; *Brassell v. McLemore*, 50 Ala. 476; *Dooley v. Smith*, 13 Wall. 604; *Railroad Co. v. Johnson*, 13 Wall. 195.

STONE, J.—The present action was instituted to recover back money paid May 10th, 1870, on the ground that it was paid involuntarily, in excess of what was due. Appellant's intestate had, in 1867, recovered judgments against the appellee for over ten thousand dollars, on debts contracted in 1858. Executions for the collection of these judgments were in the hands of the coroner acting as sheriff, and had been levied on lands of the defendant, which were about to be advertised and sold. Plaintiff's attorney had endorsed on the executions, pursuant to instructions, that "the clerk and

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sheriff are required to receive in satisfaction of the damages in this case, nothing but gold and silver, or its equivalent." The defendant, Bland, tendered the amount of the judgments, interest and costs, in legal tender United States treasury notes, in full payment of the executions, which plaintiff's attorney declined to accept. He offered to take the notes tendered at 15 per cent. discount. Gold coin was then worth 15 per cent. premium; silver coin 10 per cent. The defendant refused to accede to these terms. After some negotiation and altercation, the defendant proposed to pay in U. S. treasury notes at 10 per cent. discount. Plaintiff's attorney, after conferring with his client, agreed to accept, and did accept this sum in full satisfaction.

When this demand of specie was made, and when the settlement took place—May 10th, 1870—the ruling of the Supreme Court of the United States—*Hepburn v. Griswold*, 8 Wal. 603—was, by all persons, considered the law of the land. In that case it was declared, "that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the constitution; and that it is prohibited by the constitution." If that decision was law, appellant's intestate was entitled to demand and receive specie in payment of her judgments. Later—in December, 1870—the "legal tender cases" were decided by the Supreme Court of the United States.—See 12 Wal. 457. The court then overruled the decision in *Hepburn v. Griswold*, *supra*, and ruled that the acts of congress, known as the legal tender acts, are constitutional, when applied to contracts made before their passage. The legal tender statutes were enacted in 1862 and 1863.

We stated above that at the time this settlement was made—May 10th, 1870—the premium on gold was 15 per cent., and on silver 10 per cent. Under the act of congress, approved January 18, 1837, the weight of the silver half dollar was fixed at 206½ grains, and all other silver coins in that proportion. These were declared to be a legal tender in the payment of debts, without reference to their amount. On the 21st of February, 1853 (10 Stat. at Large, 160), congress, by the "act amendatory of existing laws relative to the half dollar, quarter dollar, dime, and half dime," debased these silver coins, by reducing the weight of the half dollar to 192 grains, and other silver coins, beneath that denomination, in the same ratio. The statute then declared that the silver coins issued in conformity with this statute "should be legal

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tenders in payment of debts for all sums not exceeding five dollars." The act of congress of February 12, 1873 (17 Stat. at Large, 427), after again changing the weight of the several silver coins, declared that none of them should be a legal tender "for any amount exceeding five dollars in any one payment." The act of congress of 1853, reducing the weight of all our silver coins except dollars, may account for the difference in premium, in 1870, on gold and silver coins. It is within recollection that after 1853, few silver dollars of American coinage, were in circulation. Most of the silver coins, then in use, were of the denominations of half dollars and under.

In Billingslea v. Ware, 32 Ala. 415, this court said: "Compromise is a species of contract; and when it rests on a valuable consideration, it is alike binding with other contracts of corresponding solemnity. . . . This species of contract can not be weakened or destroyed by proof that less was due than the sum agreed to be paid. If such were the case, compromises would lose all their healing properties."

In Stapilton v. Stapilton, 1 Atk. 2, 10, it was said, "that an agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other; and, therefore, the compromise of a doubtful right, is a sufficient foundation of an agreement."

In 2 Ball & Beatty—Leonard v. Leonard—the Lord Chancellor said, "if the validity of a deed of compromise is to depend upon a subsequent decision on those rights, which were the subject of the agreement, no disputed or disputable title could be compromised."

In Pickering v. Pickering, 2 Beav. 31, 56, Lord Langdale said, "when parties, whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their claims among themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time; and that, notwithstanding the subsequent discovery of some common error."

In Stewart v. Stewart, 6 Clark & Finlay, 911, 968, Lord Ch. Cottenham, delivering the opinion of the court, quoting from Lord Alvanley, said: "If parties will, with full knowledge (of doubts and difficulties as to their rights), act upon them, though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time, it shall be binding." And he adds: "There was a case before the

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lord chancellor, in which it was held that the court will enforce such an agreement, although it turns out that the parties were mistaken in point of law, even supposing counsel's opinion was wrong."

In *Durham v. Wadlington*, 2 Strob. Eq. 258, the court decided that, "when a compromise of a doubtful right is fairly made between the parties, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and can not be affected by any subsequent investigation and result."

In *McKinley v. Watkins*, 13 Ill. 140, the compromise was made and the money paid under a threat of suit; and the same doctrine was declared. To the same effect are *Logan v. Mathews*, 6 Penn. St. 417; *Good v. Herr*, 7 Watts & Serg. 253; *Brandon v. Medley*, 1 Jones Eq. 313.

We consider it unnecessary to make a further collation of authorities. The doctrine is fully sustained by the following numerous cases, for the careful collection of which we are indebted to counsel for appellant: *Naylor v. Winch*, 1 Sim. & Stu. 555; *Haney v. Cooke*, 4 Russ. 34; *Lawton v. Campion*, 18 Beav. 87; *Russell v. Sprye*, 8 Hare, 222; *Kerr v. Lucas*, 1 Allen, 279; *Leach v. Fobes*, 11 Gray, 507; *Sargent v. Larned*, 2 Con. 340; *Payne v. Bennett*, 2 Watts, 427; S. C. 5 Watts, 259; *Moore v. Fitzwater*, 2 Rand. 442; *Zane v. Zane*, 6 Munf. 406; *Perkins v. Gay*, 3 Sug. & R. 327; *Weed v. Terry*, 2 Doug. (Mich.) 344; *Blake v. Peck*, 11 Verm. 483; *Barlow v. Ocean Ins. Co.*, 4 Metc. (Mass.) 270; *Williams v. Alexander*, 4 Ire Eq. 207; *Carlisle v. Barker*, at December, 1876.

There must, however, be no misrepresentation or concealment of facts, by either party, to mislead the other.—See authorities above, and *Wheeler v. Smith*, 9 How. U. S. 55.

In the present case there was no misrepresentation or concealment. The decision in *Hepburn v. Griswold* was the authority for all that was represented, and it fully justified it. If Bland had consulted counsel, he would have been informed that plaintiff could compel him to pay in coin that was a legal tender. Such would have been the counsel, at that time, of any well informed lawyer. Chief Justice Chase was the author of the first legal tender act, and Chief Justice Chase delivered the opinion in *Hepburn v. Griswold*, which pronounced it unconstitutional as to debts previously contracted. Hence, at that time, it can scarcely be said there was a doubt of Bland's liability to pay in specie. If he had desired to controvert his liability to pay in coin, he could have paid, or tendered in legal tender treasury notes, the amount of the judgments, interest and costs, and tested

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his further liability, by proceedings in supersedeas. This he did not do. The plaintiff demanded coin, or treasury notes, with fifteen per cent. added—the premium on gold. The defendant offered treasury notes and ten per cent. added. This, after obtaining authority from his client, was accepted by the attorney. This settlement has all the qualities of a compromise of a doubtful or disputed claim, under the rule declared above, and the money can not be recovered back.

It is unnecessary to notice the other questions argued. What we have said will furnish a sufficient guide on another trial.

Reversed and remanded.

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Bill in Equity to enforce Vendor's Lien, &c.

Vendor's lien on land; what debars enforcement of.—If an administrator having sold lands under order of the probate court, accepts in part payment a debt due from himself to the purchaser, the distributees may elect to treat it as a payment, and hold the administrator liable, or disregard it entirely and hold the purchaser liable for the amount, and enforce a vendor's lien on the land also; yet, if, with full knowledge of the facts, they elect to charge the administrator with the amount in his accounts, they can not afterwards revoke that election, and proceed in equity against the purchaser of the land.

APPEAL from Dallas Chancery Court.

Heard before Hon. CHARLES TURNER.

The appellees, Sarah Norris and others, heirs at law and distributees of James Moss, deceased, filed this bill against Lamar, administrator of Moss, and Nunn and others, seeking, among other things, to enforce a vendor's lien on certain lands which the administrator had sold and conveyed to Nunn.

The case was as follows: Lamar obtained an order of the probate court to sell the lands for one third cash, and the balance to be paid in one and two years, for the purpose of effecting a division. He advertised and sold the lands, reporting to the court that he had sold for cash, the whole amount of which had been paid. The court confirmed the sale, and ordered the execution of a conveyance to the purchaser, which was accordingly made and delivered, and Nunn was put in possession of the lands. The fact was that the purchase money had all been paid in cash except a thousand dollars, in payment of which Lamar accepted his own note,

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which Nunn held. The bill alleged that these facts were unknown to the complainants when the report of sale was confirmed, and also alleged that on an annual settlement after this, Lamar charged himself with the full amount of the purchase money, and that this sum entered into the amount with which he was charged on his final settlement, and that on this settlement decrees were rendered against Lamar in favor of the several distributees for their respective shares of the amount found due by him. This final settlement took place more than a year after the confirmation of the sale by the probate court, and the bill states that complainants were then ignorant of the facts upon which they now rely for relief; but the proof shows the contrary. All the debts of the estate have been paid, and the administrator is insolvent. It is charged in the bill that Lamar's sureties were also insolvent. The names of these sureties are not stated in the bill. The depositions show that certain named persons are insolvent, some of whom are mentioned as his sureties, but it is not shown, except inferentially, how many sureties he had, or whether the persons proved to be insolvent were all of his sureties. The cause was submitted on bill, answer, and testimony, a demurrer to the bill having been overruled; and the Chancellor ordered a reference to the Register, who reported that all of the purchase money had not been paid, and found that \$1,262 was still due thereon. The chancellor confirmed this report, and decreed a sale of the land for its payment.

The overruling of the demurrer and the final decree rendered, are now assigned for error.

REID & MAY, with whom were MORGAN, LAPSLEY & NELSON, for appellants.—There is no equity in the bill. The complainants having elected to charge Lamar with the purchase money of the land, can not, now that the election has proved unfortunate, call on Nunn to pay for the land again.—*Weir v. Davis & Humphries*, 4 Ala. 440.

P. G. WOOD, *contra*.—When Lamar accepted his own debt in payment of a part of the purchase money, he committed a *devastavit*. Nunn participated in it. The law charged him with notice that the administrator could not thus dispose of a debt due the estate. Here, then, is the case of a purchaser knowingly participating in a *devastavit*, getting thereby lands of an estate without paying for them. This gives the heirs and distributees (there being no debts) the right to compel him to make payment, and equity will enforce in their favor a vendor's lien to the extent of the unpaid purchase money.

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BRICKELL, C. J.—We may concede that Lamar's acceptance of his own debt, in part payment of the purchase money of the lands, was unauthorized; and that it rested in the election of the appellees, either to treat it as a payment, and hold him liable for it, or, to disregard it, and hold Nunn liable for an amount of the purchase money, equal to the debt. It may be conceded further, that if they elected to disregard it as a payment, the appellees would have had a lien on the lands for an amount of the purchase money equal to it, which a court of equity would have enforced. The appellees were thus clothed with inconsistent rights, and were bound to elect which they would exercise. Lamar, as administrator, could be charged only on the ground that the acceptance of his own debt, was a payment of the purchase money. It would result from charging him, that there would be no right of recovery against Nunn; for that right depends on the ground, that the purchase money has not been paid. It does not appear to have been controverted by evidence, (though, the bill avers the contrary) that on the final settlement of Lamar's administration in the court of probate, the appellees, with full knowledge of the facts, caused, or suffered him, to be charged with the entire purchase money of the lands, thus increasing the amount of the decrees they obtained against him. Having thus elected to treat the purchase money as paid, and obtained decrees against Lamar for it, they cannot now assert it is unpaid, and proceed against Nunn for its recovery. They have elected the right they would exercise, and must abide the election.—*Buller v. O'Brien*, 5 Ala. 316; *Pickens v. Yarbrough*, 30 Ala. 408; *Williamson v. Ross*, 33 Ala. 509.

The decree of the chancellor must be reversed, and a decree is here rendered dismissing the bill, at the costs of the appellees in this court, and in the Court of Chancery.

Nabring v. Bank of Mobile.

Trover for Conversion of Stock transferred as Collateral for Debt.

1. *Execution; upon what can not be levied.*—An execution can not be levied on shares of stock of an incorporated company, which have been pledged or mortgaged by the defendant in execution, as security for a debt, and transferred on the books of the company to the pledgee or mortgagee; and a purchaser at sheriff's sale, under such levy, acquires no title to the shares.

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2. *Pledge of stock; when pledgee has no authority to sell.*—Where a stockholder of an incorporated company, borrows money, and as security causes his shares to be transferred to the lender on the book of the company (R. C. § 1783-8), the transaction is a pledge, and not a mortgage, and the lender has no right to sell or transfer the shares to another, without demanding payment of the debtor, or giving him notice of the intention to sell; nor can the lender sell at private sale for less than the market value of the shares.

3. *Same; conversion of shares; when pledgee may recoup deb., etc.*—Trover lies for the conversion of shares in an incorporated company; and the pledgee, when sued for such conversion, may recoup his debt from the pledgor.

4. *Trover for conversion of stock; what title will not support.*—Although a stockholder, whose shares have been duly transferred on the books of the company, as security for a debt, may not have such legal title as will enable him to maintain trover against the pledgee, for an unauthorized sale, he may maintain a special action on the case; and a count in case may be added to the complaint in trover by amendment.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

Nabring, the appellant, borrowed of appellee, the bank of Mobile, in 1867, \$3,000; and, to secure the repayment, he caused to be transferred to the bank thirty-four shares of the capital stock of the Royal Street Railroad Company of that city, on the books of the company. Afterwards he increased the security by a mortgage of some real estate. These thirty-four shares, by the investment of dividends, were increased to fifty-six, which, at the time of the sheriff's sale hereinafter mentioned, were worth \$5,600. From the date of the transfer to the sheriff's sale, "said bank of Mobile was considered by said railroad company as the sole owner of said stock; and they knew and recognized said bank, and no other person whatever, as the owner thereof, and the same stood on the books of said corporation as the property of the defendant"—the bank.

In 1872, the sheriff of Mobile county, having in his hands writs of execution in favor of certain judgment-creditors of Nabring, against him, and being informed that the president of the railroad company had, in answer to a deputy sheriff, informed him that Nabring did not have a dollar's worth of stock in that company, and had not owned any stock therein in three or four years, indorsed on said executions that, on the 2d day of February, 1872, he levied them on certain real estate in the city of Mobile, described in this endorsement. It is the same that had been mortgaged to the bank. Then follows this entry, as a continuation of the indorsement: "Also, on the same day, I levied on fifty-six shares of the Royal Street Railroad stock, and I advertised in the Republican, a newspaper printed in the city of Mobile, the above described property for sale on the first Monday of March, 1872, and before the hours of sale, I was directed by the plaintiff's attorneys to postpone said sale until the first

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Monday of April, 1872, on which day I sold, in front of the court-house of Mobile, all the above described estate, to John R. Tompkins, for the sum of ten dollars; also, on the same day, and at the same time and place, I sold said Royal Street Railroad stock to the said Jno. R. Tompkins for the sum of ten dollars. I will, further, return that immediately before the sale of all the above described property, I announced that the bank of Mobile held a mortgage on said real estate, and thirty-six shares of the Royal Street Railroad stock, for the sum of — dollars." At the foot of the endorsement, it is dated June 28, 1872, and then signed by the sheriff.

According to the record, "Tompkins went at once to the cashier of the bank of Mobile, and paid off the debt due to it by Nabring; and the bank, without notifying Nabring, assigned and transferred said note and mortgage" [note for the money borrowed and mortgage of the real estate] "to said Tompkins, . . . and also delivered up to said Tompkins said fifty-six shares of Royal Street Railroad stock, and transferred the same to him on the books of said company, and most of which he sold, a few days after said transfer, at \$100 per share." At the time of the sheriff's sale, Nabring's debt to the Bank amounted to \$4,234. He brought an action of trover, claiming \$2,000 as damages, against the bank for conversion of the railroad shares.

The circuit judge charged that the levy and sale were conclusive as to plaintiff, and transferred his interest to Tompkins, who had a right then, by paying plaintiff's debt to the bank, to redeem the shares and have them transferred to himself,—and the bank was, therefore, not liable in this action for so transferring them. The circuit judge charged, further, that plaintiff, Nabring, ought to go into a court of chancery for his remedy, and could not recover in this action; that the levy and sale were valid, and plaintiff could not recover. "To which general charges, and to each and every part of the same, the plaintiff excepted" and took a non-suit, with a bill of exceptions, for a revision of the rulings, according to the statute.

D. P. BESTOR, for appellant.

WM. G. JONES, *contra*.

MANNING, J.—The first question in this case is, whether or not there was a valid levy and sale of the shares of stock?

By section 2871 of the Revised Code, it is enacted, "Exemptions may be levied—1. On real property," etc.: "2. On

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personal property of the defendant (*except things in action*), whether he has the absolute title thereto, or the right only to the possession thereof, for his own life, or the life of another, or for a shorter period. But this does not apply to a possession acquired by a *bona fide* hiring of chattels: 3. On an equity of redemption in either land or personal property. When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities." The exception in the second clause of "things in action," from personal property that may be levied on, extends, of course, to the personal property, in which an equity of redemption may be sold. For, if things in action, of which the defendant is absolute owner, may not be levied on and sold under an execution, certainly things in action, in which he has only an equitable or defeasible contingent interest, cannot be. The shares of stock, for the conversion of which this suit was brought, were "things in action." They, therefore, were not made liable to execution in any manner by these statutory provisions. And, as they were not so liable by the common law, it depends entirely upon sections 1783 *et seq.* of the Revised Code, whether or not the sheriff had any legal authority to sell them at all.

Section 1783 declares that "the shares or interest of any person, in any incorporated company, are personal property and transferable on the books of the company, . . . and such shares or interest may be levied on by attachment or execution, and sold as goods and chattels, and the purchaser shall be the owner of the share, or shares, or interest bought by him, and the officer making the sale shall transfer the same to the purchaser in writing, which *shall be registered on the books of the company.* The levy made may be made with or without the officer's having possession of the certificate, or other evidence of the ownership of the stock or interest, by endorsing the levy on the attachment or execution, stating the number of shares, or other interest levied on.—§ 1784. The *custodian of the books* of the company must give to the officer having such writ, upon its being exhibited to him, a statement, signed by him in his official capacity, of the number of shares or amount of interest held by the defendant in the company." And for his neglect or refusal to do so, the custodian of the books is subject to a fine. To the end that the ownership may appear by the books, on which it is previously declared the shares are to be transferable, section 1786 enacts: "When any incorporated company does not by its charter, by-laws, or otherwise, require the transfer of its stock to be *made or registered on the books of the company,*

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such company must forthwith make such provision." Section 1788 provides that "no lien shall be created against the stock" of any stockholder against whom the sheriff has an attachment or execution, "until the plaintiff, his agent, attorney or sheriff in whose hands such execution or attachment shall be placed, gives notice to the secretary, cashier or other officer of such corporation, *who has custody of the books*, that such execution or attachment has been issued and the name of the defendant therein; and all transfers duly made before such notice is given, shall be as valid as if the levy had not been made." Of course, the levy would not be perfect until the lien was thus created.

These enactments are in derogation or change of the common law, and it is to be observed that while they provide that the shares of any person in an incorporated company, "may be levied on by attachment or execution, and sold as goods and chattels,"—that is, upon such advertisement and in the manner goods and chattels must be sold under execution,—they do not declare that an equity of redemption, or other interest less than that of an absolute owner, in such shares, may be levied on and sold. And the provisions so carefully made, to have the ownership of the shares appear by and made transferable upon the books of the corporation, show a purpose, since the shares which the sheriff is to sell, are not visible and tangible, and therefore not capable of manual caption and delivery,—to make the right to them as unembarrassed and absolute as possible. In making a levy of goods and chattels, a sheriff must find and take possession of and on the day and place of sale produce them, so that they may be seen and examined by bidders. This he can not do with the shares of stock in a corporation—mere choses in action. The nearest approach to finding and obtaining possession of such things, and the only mode of conveying them, is to find whose name stands as that of the owner of them upon the books of the corporation,—and by giving notice that they are levied on as the property of such person and exhibiting the execution against him to the custodian of the books, to hold them from transfer to any body else until the sheriff's sale, and then to have the sheriff's certificate of the sale registered on the books, as evidence of the transfer of the shares to the purchaser from him. The transfer of the stock on the books, "is equivalent to actual possession, because it is . . . the means of obtaining possession . . . The capital stock of a corporate company, is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. . . . It may be that

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nothing short of the transfer of the title on the books of the company would be sufficient to give the absolute possession of the stock and to secure it against a transfer to some other person."—(*Wilson v. Little*, 2 N. Y. 447.) This certainly is true in regard to the stock which is the cause of this controversy. And the statutes cited, recognizing the difficulties of the subject, have prescribed the process above set forth as the only one by which a sheriff's sale can be made of such things as shares of the capital stock of a corporation, in such a manner as to afford intelligible information of what it is that he offers for sale, how the bidder, if he buys it, shall obtain possession, and how he may find out what the thing sold is probably worth. Sheriff's sales would be terrible scourges, indeed, if not so conducted as that these things may be ascertained with some degree of certainty.

Now, it is clear, that the process of sale prescribed by the statute, is not applicable to shares of stock situated like those now in controversy. Whether they were merely pledged to the bank as security for Nabring's debt to it,—leaving in him a legal right to the restoration of them on payment of the debt, or were mortgaged to the bank, leaving in Nabring an equity to redeem them, in either case they could not be reached in the method of proceeding which the sheriff must pursue in order to make the levy and sale effectual. And from this it follows, that as at common law, goods and chattels that were pledged and in possession of the pledgee, or that were mortgaged and in possession of the mortgagee, were not subject to levy and sale under execution—so shares of the capital stock of incorporated companies, pledged or mortgaged and so situated, are not made liable by statute, to execution sale. An execution creditor, in such a case, must proceed in some other manner, as by a bill in equity, to make the interest of the defendant in stock so situated available for the payment of the debt. We might enforce these views by showing how impracticable it would be to carry out the statutes upon a different interpretation of them. The endeavor to do so would produce great embarrassment and injury, if not insurmountable difficulties. In practice, besides, the interpretation contended for would offer opportunities and temptation to dishonest speculation, ruinous to parties to executions. But it is sufficient to say, that the shares in question were not subject to levy and sale under the executions against Nabring, and that Tompkins took no title by the supposed sale to him, and did not succeed to the rights of Nabring in the stock. It follows that the circuit judge erred in his charge of the contrary.

The cause has been argued as if the case were that of a

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mortgage. We think the bank was pledgee, not mortgagee, of these shares. They were put in pledge to it for the payment of the money Nabring borrowed; and there remained in Nabring a legal right to demand and have them upon payment of the debt. The reasons for so ruling are presented in a very satisfactory manner by RUGGLES, J., of the Court of Appeals of New York, in *Wilson v. Little, supra*, a case almost exactly like the present, after thorough argument and consideration.—2 N. Y. (2 Coms.) 443; Story on Bailments, § 290.

As pledgee the bank had no right to sell the shares without first demanding payment of the debt from Nabring, or giving him notice of the intention to sell. And, of course, it could not sell the stock at private sale, for less than its current market price; which is shown to have been \$100 a share. From Tompkins it took less than this, only the amount of Nabring's debt to it. And the bank must be responsible to Nabring for the difference between that amount and the market value of the stock; which difference Nabring, after the sale, demanded of it. A pledgee may recoup the debt of defendant to him, when sued by the pledgor for conversion of the things put in pledge.—*Stearns v. Marsh*, 4 Denio, 227.

On behalf of the appellee, it is contended that, even if the court erred, it was error without injury, for the reason, as counsel insist, that plaintiff was not entitled to recover by this action of *trover*: 1st, because it will not lie for the conversion of any other than tangible corporeal chattels; and, 2dly, because the legal title which a plaintiff in that action must have, was not in him, it having been conveyed to the bank. The first of these reasons is not sound, according to cases in this and other courts.—See *St. John, survivor, v. O'Connel*, 7 Port. 466. Upon the second reason, we are inclined to agree with counsel for the appellee. But it is not necessary for us to decide the question. It was not raised in the court below,—and if it had been, an amendment would have been allowable by adding a count in case for the same cause of action. A special action on the case would certainly have been sustainable upon such a cause of action; and a count in case may be joined with one in *trover*. The circuit judge erred in holding that plaintiff must go into chancery for redress. We find it unnecessary to consider the case in another aspect, as was intended.

The judgment must be reversed and the cause remanded.

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Moses et al. v. Dade.

Bill in Equity to remove Cloud on Title, and to compel Party in Possession to restore Lands.

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1. *Conveyance by wife; what will not avoid.*—Where husband and wife, on valuable consideration, convey her lands to another by deed duly executed and acknowledged, she can not impeach it, as against the grantee, because of the fraud or undue influence of the husband, in which the grantee did not participate, which he has not induced, to which he is not a privy, and of which he was not informed.

2. *Same; execution of; how brought to notice of court pending wife's suit for property; effect of.*—Where, pending the wife's suit to have the lands restored to her, she and her husband, on valuable consideration, execute a conveyance of them to the defendant, by deed duly executed and acknowledged, such defense is properly brought to the notice of the court by cross bill; and the deed is valid, and a bar to the further maintenance of the wife's suit.

APPEAL from Chancery Court of Mobile.

Heard before Hon. HURIOSCO AUSTILL.

The original bill was filed by the appellee, Henrietta Dade, against one Clayton, Isaac C. Moses, and Morris Dade, complainant's husband. Its purpose was, to have a deed of certain realty, made by complainant and her husband, to one Clayton, annulled and cancelled as a cloud on her title, and to compel Moses, who, it was alleged, was in possession, claiming through a conveyance from Clayton, under circumstances not constituting him a *bona fide* purchaser for value, to restore possession to her. It was afterwards amended by making LeBaron, and Mrs. Esther McDade, parties defendant.

The facts, as disclosed by the pleadings and testimony, are that Mrs. Dade owned the premises in controversy, and desiring to sell them, she and her husband, on the 28th day of December, 1868, (she not then being of age,) to facilitate the sale, gave Clayton, her agent, a deed for the premises, properly executed in all respects, except that the name of the grantee was left blank. Clayton, in fraud of complainant, and without her knowledge, filled up the blank with his own name, and had the deed recorded. Previous to this Clayton, who had been a man of means, was considerably indebted to Moses, and being pressed by Moses for the money, gave him a mortgage on the premises to secure a part of it, Moses then having no reason to suppose Clayton did not own the property.

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The mortgage debt not having been paid, Moses filed his bill against Clayton for foreclosure, obtained a decree, and sale was had, at which LeBaron became the purchaser. He afterwards conveyed to Moses, and Moses in turn conveyed to LeBaron, as trustee for his wife Esther, and under that deed and claim of title, said Esther was in actual possession of the premises at the time of the filing of the bill and trial of the cause.

While the cause was pending, Mrs. Dade having then reached majority, she and her husband, in consideration of two hundred and fifty dollars, cash paid by said Esther, conveyed the premises in controversy by warranty deed, to said Esther. This deed was duly acknowledged by husband and wife, before a justice of the peace, who certified it according to the form prescribed by law.

This having occurred since the institution of the suit, said Esther, in her answer setting up said deed, "propounded the same in the nature of a cross bill, on plea *puis darrien continuance*," and asked appropriate relief accordingly.

Mrs. Dade answered, admitting the execution of the deed, and the payment as stated, but averred that the execution of the deed was procured by fraud. The evidence shows that her husband, while the suit was pending, importuned Moses to make a payment of two hundred and fifty dollars to Mrs. Dade and get a deed, and end the whole litigation. He told his wife, however, that her suit had failed, and she could either take this or nothing; and acting on this representation she executed the deed. There is no proof whatever showing that Moses or his attorney, or Mrs. Moses, knew of these representations, or in any way connived at the fraud perpetrated upon Mrs. Dade by her husband.

The evidence as to the value of the premises, was conflicting, some of the witnesses estimating it at \$1,000, and others rating it as high as \$1,500.

The amount of the mortgage debt to Moses was over seven hundred dollars, and prior to making the conveyance to Mrs. Moses, Mrs. Dade and her husband had conveyed one-half of the premises to third persons.

The Chancellor dismissed the cross bill; overruled a demurrer to the original bill, based on the adequacy of the remedy at law; and rendered a decree granting the relief prayed.

This decree is now assigned as error.

WATTS & WATTS, and RAPHAEL SEMMES, for appellant.—
Complainant below showed that she was out of possession and another was in possession claiming title. Ejectment

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was an adequate remedy. The last deed of Mrs. Dade and her husband, if valid, certainly defeats her suit. Whatever may have been her rights, up to that time, no court could grant her relief after that deed was proved. The only fraud proved, in connection with this deed, is that Mrs. Dade's own husband practiced on her. She does not connect any other defendant with it, and Mrs. Moses was a *bona fide* purchaser for value, without notice.—*Miller v. Marx*, 55 Ala.

ANDERSON & BOND, *contra*.—The real issue, in this case, depends on the validity of the conveyance of the premises, pending suit, by appellee to Mrs. Moses. Appellee was a married woman—her estate a trust estate in custody of the court—and being under disability to contract with reference to it, the court would in no event allow her to be turned out of court, until it is made to appear that the settlement was fair, just and equitable under the circumstances. The price paid was inadequate, and that was enough to put suspicion in the transaction. Couple with this the undisputed misrepresentation made by the husband, and the attitude the parties occupied before this, and it is difficult to resist the conclusion that the appellants knew of the means practiced to procure the wife's signature to the deed. The original bill was not without equity—chancery alone had jurisdiction to remove the cloud on appellee's title, and obtaining it for that purpose, would go on and do complete justice.

BRICKELL, C. J.—It is not now necessary to inquire whether the original bill presents a case within the cognizance of a court of equity, or whether the right and remedy of the complainant was not solely at law. The matter of a plea *puis darrien continuance*, at law, is often available in equity only by cross-bill. A matter of defense, arising after issue joined, as a release executed by the complainant to the defendant, can be introduced only by cross-bill.—*Story's Eq. Pl.* § 393; *Cochran v. Rison*, 20 Ala. 463. The cross-bill disclosed that pending the suit, the complainant and her husband had, by deed executed and acknowledged in the form prescribed by the statute, conveyed the premises in controversy to the appellant, Esther. If this conveyance is valid, though it be conceded to the complainant there was equity in the original bill, its operation is a release of the right involved.

In the answer to the cross-bill, (and the allegation is supported by the evidence of the complainant,) it is averred she was deceived into the execution of the conveyance by the fraudulent misrepresentations of her husband. It is not

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averred, and is not shown by evidence, that the grantee or her husband, who paid the consideration, was privy to, or informed, or in any way whatever participated in these misrepresentations. The conveyance is executed and acknowledged, and the acknowledgment certified by an officer, the statute authorizes to take and certify the acknowledgment of conveyances of the real estate of married women. If the husband were claiming a right under the deed, it may be, these fraudulent and false representations would avoid it. The complainant knew she was not conveying to him, but to her adversary in a suit, which, if she did not know or believe was then pending, she knew had been, and if she was misled and deceived by the representations of her husband, she must accept the consequences of her misplaced confidence. They can not be visited on those who dealt fairly and in good faith with her, relying on her solemn acknowledgment before an officer of the law, that informed of the contents of the conveyance, she freely and voluntarily executed it.—*Miller v. Marx*, 55 Ala. 323. There is not a fact or circumstance to be found in this record, casting the shadow of suspicion on the *bona fides* of the conveyance, as to the complainant and the grantee, and it is impeached only because the complainant had the folly to rely on the statements of her husband, who, for his own selfish purposes, deceived her. It is very easy to make such an imputation on any conveyance a wife may execute, and it can never be disproved, when made, without the aid of the husband. Such aid will rarely be afforded; and most often he will, now that a statute opens a door to him, be the ready and convenient witness, to crown himself with dishonor, that the wife may be restored to that of which she had parted, and he restored to partial ownership of it. When husband and wife, on a valuable consideration, execute a conveyance to another, it can not be impeached because of the fraud or undue influence of the husband, (duress not being shown,) in which the grantee does not participate, which he has not induced, to which he is not privy, and of which he is not informed.

The decree of the Chancellor must be reversed, and this court, proceeding to render the decree which ought to have been rendered, doth order, adjudge and decree, that the deed of the premises in controversy, made by the complainant Henrietta T. Dade and her husband Morris H. Dade, to Esther Moses, bearing date 17th day of July, 1871, is valid and operative, and is a bar to the further continuance of this suit. It is further ordered, adjudged and decreed, that the defendant, J. Clifton Moses, pay the costs of the original suit, to be taxed by the register, which had accrued prior to the 17th day of July, 1871.

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It is further ordered, adjudged and decreed, that the costs of the original suit, accruing subsequently to the 17th day of July, 1871, and of the cross-bill, in the Court of Chancery, to be taxed by the register, be paid by Whitfield Trower, the next friend of the complainant Henrietta T. Dade. The costs of this appeal must be paid by said next friend.

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Indictment for Murder.

1. *Witness for prosecution; credibility of, how may be assailed.*—The credibility of a witness for the prosecution may be assailed, by proof of hostility to the prisoner, or other motive, which may be fairly presumed to bias the witness in favor of the State and against the prisoner; and although the witness admits such hostility or bias, the prisoner has the right, on cross-examination, to draw out particular declarations, that the jury may determine the extent and malignity of such hostility.

2. *Same.*—The proper predicate having been laid, it is error not to allow the prisoner to ask a witness for the State, on cross-examination for the purpose of assailing his credit, whether the witness had not stated he would give a sum of money to have the prisoner killed.

3. *Witness; competency of.*—The wife of a person who was at one time charged with the murder, for which the prisoner alone is indicted and tried, is a competent witness on the trial to testify to facts exculpatory of the husband, whom the defense sought to prove the guilty agent in the murder.

4. *Evidence; admissibility and relevancy of.*—The testimony of a witness, who lived in the prisoner's family the Spring before a murder which he was accused of committing that Fall, as to where he kept his gun, and as to the hour at which certain of his children, who were witnesses, arose, is too remote to afford any reasonable inference as to where the gun was kept the night preceding and on the morning of the murder, or as to what time the children rose that morning; and is properly excluded.

5. *Charge; what properly refused.*—A charge that the suppression of evidence by the prosecution is a material circumstance for the consideration of the jury, is properly refused, when it is not shown that the evidence would shed any light on the guilt or innocence of the accused, or that it was in the possession of the prosecutor or was improperly withheld.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The appellant, Thomas Fincher, was convicted of the murder of Simeon Wheeler, and sentenced to imprisonment in the penitentiary for life. Wheeler was quite an old man, and was in the habit of walking from his residence, near "Eight Mile Creek," to Spring Hill, and there taking the cars for Mobile, every Monday morning. On Monday, October 12th, 1874, his body was found on the public highway, with half of his head shot off, and powder-marks on his neck and face. Near his body was his hat and some bits of

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paper, to which reference will be made further on. He had evidently been killed about sunrise that morning. Fincher traveled on the same road later in the morning, and lived about a mile from where Wheeler was killed, and the evidence, connecting Fincher with the murder, was purely circumstantial.

Many angry remarks and threats by Fincher against Wheeler before the killing were proved; and among the witnesses who testified to them was one Broadbuss, a witness for the State, who testified that Fincher, in the Spring of 1874, had said that "Wheeler was an old hog, and he meant to break him up one way or another." On cross-examination, the witness stated that he was not on friendly terms with Fincher; that he was not on speaking terms with him; that threats had passed between them, and they had quarreled about a dog. The defendant's counsel then asked: "Did you, at Fincher's house, about twelve months before the first shooting of Fincher, which was in February, 1867, tell Napoleon Long that you would give \$250 as your share to have Fincher killed?" The court, at the instance of the State, refused to allow the witness to answer, and the defendant excepted.

It appeared from the testimony, that one George Spencer, a negro man, had, at one time, confessed that he had killed Wheeler; that the confession was made to Fincher while he had Spencer under arrest for stealing a gun, and that Fincher carried Spencer before a magistrate, who committed him to jail. Spencer remained in jail about a year, but was never tried, and at the time of this trial was at liberty. An admission was made by counsel of the facts to which he would testify if present. His statement consisted of a detailed account of how he came to make the confession; that it was false, and made by the procurement of Fincher, who promised to divide the reward with him, and prevent him being harmed. There was testimony tending to show that Spencer lived in the neighborhood and could have committed the offense. Spencer's wife, against the objection and exception of the defendant, was permitted to testify to facts going to show that he was not the person who killed Wheeler, and to prove an *alibi* for Spencer at the time of the killing, and also contradictory of his being in want, which was one of the reasons given in his confession, for committing the murder.

Among other criminating evidence relied on by the State, was the testimony of witnesses, who, at that time, resided in Fincher's family, as to his conduct in loading his gun the evening before the murder, and remarks made by him shortly before and after that, and as to his gun being missing from

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its accustomed place, early on the morning of the murder, about which time Fincher was shown to have left the house. It was shown that Fincher slept in a room outside the main building, and that when he retired to sleep, the doors of the main building were fastened, and he could not get in until the doors were unfastened in the morning. Some of the witnesses for the State testified that Fincher always kept his gun in a rack over the bed, in the room in which he slept, and that he did this for a long time before the murder. A witness for the defense afterwards testified that there was no gun-rack in the room in which Fincher slept. Two step-children of Fincher, who then resided in his family, testified in behalf of the State, to certain statements made by Fincher at breakfast, on the morning of the murder, with regard to the deceased. Another step-child testified in his behalf that she was present and no such declarations were made; but she was contradicted in this by the other two, who testified that she had not gotten up that morning, and was not at breakfast.

The defense, among other witnesses, introduced a Mrs. Demorest, who stated that she was living at Fincher's the Spring before the murder, and that the defendant then kept his gun in a rack in the sitting room, and that this was his habit at that time. On motion of the State the court ruled out this evidence, and the defendant excepted. This witness further stated, that she had lived at Fincher's all that winter before the killing, and was familiar with every thing about the house and family. She was then asked "what were the habits of the family about getting up at that time;" but, on objection of the State, the court refused to allow the witness to answer, and the defendant excepted.

It was shown by the State, among other things, that on Friday before the killing, defendant remarked to a witness, that "old man Wheeler had some papers against him, which he (Wheeler) was going to bring before the grand jury, but that he should never cross Eight Mile Creek with them." It was proved that a short time before his death, Wheeler had gotten several of his neighbors to sign a paper, charging the "defendant and one Boker and Thompson, and a dozen others, with gambling and selling whiskey."

When Wheeler's body was discovered, there were some bits of paper near by, which seemed to have been there only a short time. Several witnesses testified that they did not know what became of them. A witness for the defense testified that the pieces were torn up so small that they could not be read, and the witness could not state that they were parts of the paper referred to, but he saw on some of the

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pieces names of some of the persons that Wheeler had on the paper he intended to lay before the grand jury. This witness testified that he picked up these pieces of paper, and handed them to Mrs. Brown, who handed them to a son of Wheeler, who, as the bill of exceptions recites, "had been present during the whole trial, making suggestions to the solicitor." It was shown that Fincher could neither read nor write. There was no evidence that these bits of paper had been preserved, or to show what had become of them, nor does it appear that any demand was made for their production.

The testimony was voluminous, but the foregoing is all that is material to the questions presented by the exceptions.

Among other written charges requested by the defendant, was the following: "The court charges the jury that they may consider the evidence of the witnesses about the pieces of paper picked up near the spot where the body of Wheeler was found, and if they believe the said pieces of paper were traced to the prosecution, the withholding of said pieces of paper from the jury may be considered as evidence favorable to the accused." The court refused this charge, and the defendant excepted.

The refusal to charge as requested, and the various rulings to which exceptions were reserved, are now assigned for error.

W. S. ANDERSON and JOHN H. GLENNON, for appellant.—The court erred in refusing to allow the question put to Broadus to be answered. It is true he admitted he was unfriendly to the prisoner; but he made light of the cause of his hostility, intimating that it arose from a quarrel about a dog. The prisoner had the right to show by the witness' own declarations, that the hostility was more deadly than that, and to show to the jury from what an envenomed source the testimony of this witness was drawn.—*McHugh v. The State*, 31 Ala. 320.

Spencer's wife was not a competent witness to prove the facts to which she testified. She testified to no facts showing Fincher's guilt, or connecting him with the murder. Her testimony only went to show that her husband was not the guilty agent, which the testimony for the defense went to prove him. It is true, neither she nor her husband are parties to the record, but the rule which excludes her is based on public policy and not on interest. If Fincher was acquitted, the tendency was to put her husband on trial in his place, and if he had been on trial she would not have

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been competent. The rule ought to work both ways.—*King v. Clivinger*, 2 Tenn. 263.

Mrs. Demorest's testimony should have been received. It tended to contradict materially the statement made by witnesses for the prosecution, and to strengthen the testimony of a witness as to such witness' presence when a conversation took place. Where the gun was kept the morning and day before the murder, was material, and whether the witness, who stated she was at the breakfast table, was present, were matters of vital importance to the defendant. The fact that the evidence was weak or inconclusive, does not affect its admissibility.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—Of the several modes of assailing the credibility of a witness, the one most usually resorted to, is a cross-examination as to his relationship to the parties, his interest in the pending suit, his hostility to the prisoner, if it be a prosecution for a criminal offense, his motives, and whatever may fairly be presumed to bias him in favor of the party at whose instance he is testifying, and against the adverse party. These are matters collateral to the main issue of facts which is to be determined; and while the general rule is, that the answers of a witness to collateral questions cannot be contradicted by the party cross-examining, an exception obtains in reference to questions of this character, which are directed, not against his *general credit*, but against his *credit*, and *capacity* to testify accurately in the *particular case*.—1 Whart. Law of Ev. § 545; *McHugh v. State*, 31 Ala. 317; *Bullard v. Lambert*, 40 Ala. 204; 1 Green Ev. § 450; *Blakey v. Blakey*, 33 Ala. 611. The circumstances which affect the *particular credit* of the witness, are generally incapable of proof save by his acts or declarations, and it is but just that the witness should have his attention directed to them, and whatever explanation can be given of them without entering into particulars, should be received.—4 Phill. Ev. (2 C. & H. Notes) 717. If the witness should deny the relationship or bias, it may be proved by other evidence. Declarations in the presence of third persons, indicative of hostility, may be called to the attention of the witness, and he may be required to admit or deny them; if he deny them the persons hearing them, to whom the attention of the witness is directed, may be called to contradict him. How far the bias of the witness, from whatever cause it arises, affects his credibility, is a question for the consideration of the jury, and depends upon his manner of testifying before them, the

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consistency of his evidence with other evidence in the cause, and the probability of its truth or falsity when considered in connection with all the facts and circumstances surrounding the parties, and which are parts of the transaction. The law does not discredit the witness because of the bias—it is simply a fact for the consideration of the jury in determining how far they can safely rely on his testimony. A remote relation would not usually lie under the same imputation on his credit, as a nearer relation whose sympathies and affections were more deeply involved. A hostile feeling, generated by a sudden quarrel, would not reflect the same discredit as that which is shown to be malignant. The extent of the hostility of the witness, is the subject of just inquiry. It is not enough, and the door to further cross-examination is not closed, so that it does not descend to the particulars of the controversy between the witness and the party, by the mere statement of the witness that he is hostile to the party against whom he is testifying. The party has the right to go further, and show that the hostility is malignant and that the witness has the inclination, and would not scruple at the means or manner of doing him the most grievous injury. We hold, therefore, the City Court erred in refusing to permit the question propounded the witness to be answered.

2. Mrs. Spencer was not an incompetent witness; nor was there any objection to her testifying to facts which repelled all suspicion of her husband's guilt of the murder, with which he had at one time been charged. Husband or wife are not parties to the record, and have no interest directly involved in the prosecution. The judgment of conviction or acquittal, could not become evidence for or against the one or the other, except so far as it would be evidence for or against other strangers to it.—1 Green. Ev. §§ 241-342; 1 Phill. Ev. 71-72; *Powell v State*, MSS.

3. The general rule in regard to the relevancy of testimony, is, that the facts and circumstances which, when proved, are incapable of affording any reasonable presumption or inference, in reference to a material fact or inquiry involved in the issue, cannot be given in evidence.—*Governor v. Campbell*, 17 Ala. 566; *Campbell v. State*, 23 Ala. 44. In practice, the application of the rules presents most embarrassing questions, and it is often a matter of serious difficulty to determine whether a particular fact or circumstance is not too remote to aid the jury in arriving at a conclusion upon the principal fact to be proved, and its introduction would not confuse and mislead, directing their attention from the real issue. The only tendency of the evidence sought to be elicited from Mrs. Demorest, was the contradiction of

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the witness who testified that at and before the murder, the prisoner kept his gun on a rack in his bed room, and as to the time these witnesses rose from bed on the morning of the murder. The place at which Fincher kept his gun, and the habits of the family as to rising when Mrs. Demorest lived there, have a very remote bearing, if any, on the fact of where the gun was the night preceding and the morning of the murder, and on the fact of whether the State's witnesses, members of the family, were up at a particular hour of that morning. If her evidence had been admitted, it would have been subject to be controverted, and the jury would have been embarrassed in determining a disputed fact, which, when ascertained, would not have advanced them in the determination of the principal fact.

4. The suppression of evidence by a prisoner or prosecutor, is a material circumstance to be considered by the jury. But we cannot perceive that the principle has any application to the present case. There was no ground on which an inference could be rested that the pieces of paper, referred to in the charge requested by the prisoner, would have shed any light on the inquiry as to his guilt or innocence—none for supposing that they had been preserved, or were in possession of the prosecutor at the time of the trial, and were improperly withheld by him. There must be evidence in the possession of the prosecutor which he withholds, and material evidence, before a charge of this kind should be given.

For the error we have pointed out, the judgment is reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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Bill in Equity to set aside Conveyances as Fraudulent.

1. *Sale; what necessary to avoid as fraudulent.*—To avoid a sale, when made on an adequate new consideration, on the ground that it was made with intent to hinder, delay and defraud creditors, the attacking creditors must show that the vendor made the sale with that intent, and that the purchaser participated in it, or had knowledge of some fact calculated to put him on inquiry, and thus charge him with notice.

2. *Bona fide purchaser; what necessary to constitute.*—To constitute the defense of a bona fide purchaser without notice, the purchaser must have paid the purchase-money in full, before notice of the fraud of the vendor; and any

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payment made by him after notice is in his own wrong; but, as to partial payments, made before notice, he acquires an equity *pro tanto*. Whether the rule applies to sales of personal property, is not decided.

3. *Prayer for general relief; what relief will not be granted under.*—Where the original bill sought to set aside a sale of personal property and choses in action, on the ground that it was fraudulent as against creditors, and also asked the appointment of a receiver to take charge of the property and collect the debts, the business acquired by the purchaser being broken up by the appointment of a receiver, and the complainant failing to establish any participation on the part of the purchaser in the fraud of the vendor, the court will not, under the general prayer for relief, require the purchaser to pay over to the complainant the unpaid portion of the purchase-money.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

This was a bill filed by the appellants, The Florence Sewing Machine Company against the appellee, N. A. Zeigler, Charles L. Cherry, and William Miller, as the administrator of one Revault, a former partner of respondent, Zeigler; and sought to set aside, as fraudulent, a conveyance of certain personal property, made by Zeigler, as surviving partner to Cherry. The bill alleged that, under an agreement for the sale of their sewing machines, the appellants had furnished to N. A. Zeigler & Co. a large amount of goods, consisting chiefly of Florence Sewing Machines, and their attachments, which had never been paid for by them; that the defendant, Zeigler, as surviving partner, had, on or about the 30th day of April, 1873, with intent to hinder, delay, and defraud the appellants, sold all the property of the firm of Zeigler & Co. to one Charles L. Cherry, who was a son of Zeigler's wife, taking therefor the notes of Cherry, none of which were due when the bill was filed. The bill further alleged, that Cherry knew of and participated in the fraud thus practiced; that he was a young man without means, and unable to respond in damages to appellant; and that he was selling and disposing of the property thus acquired, to their injury.

The bill further alleged that Zeigler, at the same time, and for the same consideration, had turned over to Cherry all the notes and accounts of every description which had belonged to Zeigler & Co.; that the notes and accounts had been given by various parties to Zeigler & Co. for the purchase and hire of Florence Sewing Machines, and prayed that a receiver be appointed to take charge of the stock, and collect the notes and accounts, and hold the proceeds subject to the order of the court. The bill further prayed a discovery of Zeigler and Cherry; that Cherry be compelled to account to appellants for the property received by him; that the sale to Cherry be declared fraudulent and void as to appellants, and for general relief. In obedience to the foot note, both Zeig-

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ler and Cherry filed sworn answers, in which all fraud was denied; and Cherry positively denied any intent to delay, hinder, or defraud the appellant, or any knowledge at the time of the purchase by him, that Zeigler & Co., or Zeigler, were indebted to appellant, and averred that the purchase was made by him in good faith for the purpose of changing his employment, which had been that of a river pilot, and which kept him away from home nearly all the time, for one which he could be more at home with his family, which consisted of a wife, who was an invalid, and one small child. He admitted that, at the time he made the purchase, he had no property beyond his exemptions. He also averred that since he became aware of the indebtedness of Zeigler & Co. to appellant, he had offered first to Zeigler to rescind said contract, and restore to him the property upon the surrender of the notes given by him, which Zeigler had refused to do; that he then proposed to one Hale, the president of appellant, that if the company would surrender to him his notes, and allow him a reasonable compensation for his services while he held the property, that he would surrender it, and account to him for all money and property received by him, which offer was likewise refused. The Chancellor, pending the trial of the cause, appointed a receiver, who took possession of the property. The evidence showed that Cherry was an honest, energetic man, of good habits, and both his former employer, A. C. Donner, and his family physician, testified to his having expressed a desire and intention to change his employment for one which would permit him to be more at home, before he made the purchase.

One Anderson testified that Cherry had told him since he had taken charge of the business of Zeigler & Co., that he did so to secure the interest of his uncle, who had in his life time been a partner of Zeigler's, and to whom the partnership was largely indebted. Pending the trial, the owners of a store which had been occupied by Zeigler & Co., Cherry, and the receiver, at different times, filed a petition, praying that the receiver be directed to pay the rent then due, which petition the Chancellor granted. On the hearing, the Chancellor dismissed the bill as to Cherry on the ground that the evidence failed to establish any fraud on his part, ordered the receiver to pay the money in his hands into court, and to turn over to Cherry all notes, accounts, and property in his hands, and to settle his accounts as such receiver.

This decree is now assigned as error.

L. GIBBONS, P. & T. A. HAMILTON, for appellant.

MANNING & WALKER, *contra*.

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STONE, J.—In *Crawford v. Kirksey*, 55 Ala. 282, we said, to avoid a sale made upon adequate new consideration—that is, not in payment of a debt—on the alleged ground that it was made with intent to delay, hinder, and defraud creditors—the creditor attacking the sale must show two things: first, that the vendor made the sale with such intent; and, second, that the purchaser participated in such intent, or knew of its existence, or had knowledge of some fact calculated to put him on inquiry, and which, if followed up, would have led to the discovery that the vendor's intent was fraudulent. We cited authorities in support of this proposition.

We have considered the pleadings and evidence in this cause with great care, and are not convinced that the Chancellor erred in refusing to set aside, as fraudulent, the sale of Zeigler to Cherry. Sworn answers were required from them, and each of them denies, very fully, that Cherry was informed that Zeigler was indebted to the sewing machine company. One fact, apparent in the record, is strongly corroborative of this. Cherry was entering on a business which, to be successful, would require a continued supply of merchandise from the complainant. Succeeding to the business of Zeigler, he could not have expected to keep up trade with the sewing machine company, if he had known or suspected Zeigler was largely indebted, and in default to them.

The testimony of Cherry very fully sustains these denials in the answers, and explains why he wished to enter on a business, which would permit him to remain more at home. Dr. Gaines justifies him in this. We find nothing in his testimony, which, *per se*, causes us to distrust it. The testimony of Anderson is not enough to overcome it. Admissions and conversations are easily misconstrued; and the remark proved by him, if made by Cherry, is scarcely potent and decisive enough to fix the charge of fraudulent participation on Cherry. Hence, we find no error in the ruling of the chancellor on the main question in the cause.

There is a rule as to real estate, that to constitute a good defense of *bona fide* purchase without notice, the purchaser must have paid in full before notice of the fraud of the vendor. And if, after purchase, and before making full payment, the purchaser receives such notice, any payment afterwards made by him will be in his own wrong. But he does not thereby forfeit the money he has paid. The effect is, to render him liable to account to the creditor, attacking the conveyance, for any unpaid balance of the purchase-money; and, in some cases perhaps, to compel a surrender of the property, upon being indemnified for prior payments and im-

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provements.—2 Sto. Eq. Ju. §§ 1502 to 1505, and notes. We do not sanction the extreme doctrine that a purchaser, no matter how innocent he may be, acquires no rights against a latent equity until he pays in full and receives a conveyance. We hold that he acquires an equity *pro tanto* to the extent he pays before notice.—See Sto. Eq. Ju. § 1503b, note 2; *Yourt v. Martin*, 3 Serg. & R. 423; *Lewis v. Bradford*, 10 Watts, 67; *Bellas v. McCarthy*, *Ib.* 13; *Juvenal v. Jackson*, 2 Harris, 519; *Ulrich v. Beck*, 1 Harris, 639; *Beck v. Ulrich*, 4 Harris, 499; *Paul v. Fulton*, 25 Mo. 156; *Boggs v. Varner*, 6 W. & S. 469; *Farmers' Loan Co. v. Maltby*, 8 Paige. 361; *Frost v. Beekman*, 1 Johns. Ch. 288; *Everts v. Agnes*, 4 Wis. 343.

We need not inquire whether the same rule applies to the personalty, for under the averments and special prayer in this case, we consider such inquiry unnecessary.

The original bill charges that the sale from Zeigler to Cherry was made with intent to delay, hinder, and defraud complainant, and it prayed and obtained the appointment of a receiver, who took charge of the effects. This necessarily broke up and destroyed the adventure in the hands of Cherry. To hold him accountable for the unpaid purchase-money to the creditors of Zeigler, on account of the alleged fraud of the latter, would be to compel him to pay for that which the wrongful act of complainant has prevented him from enjoying. This relief would be incompatible with that specially prayed, and partially obtained; and, on this account, it would be oppressive and unjust to grant such relief under the general prayer.—*Reese v. Kirk*, 29 Ala. 406; 1 Brick. Dig. 704, § 938.

Having ascertained that the complainant is not entitled to relief, and that the chancellor rightly ruled against him, we need not and will not inquire into the ruling as to rents. In that question the appellant has no interest.

Decree of the chancery court affirmed.

In the affirmance of this decree, we do not intend to preclude the chancellor from proceeding to settle the accounts of the receiver appointed in this cause, nor from disposing of the fund thus brought into the custody of that court.

MANNING, J., not sitting, having been of counsel.

[Buckley v. McGuire et als.]

Buckley v. McGuire et als.*Action on Administration Bond.*

1. *Mobile, general guardian; liability of sureties.* -- Under the act "authorizing appointment of a general administrator and general guardian for Mobile county and other purposes," approved December 14, 1859, an official bond given by the person appointed, conditioned "that he shall faithfully administer all estates which may come into his charge as general administrator and guardian," no matter how often he may be reappointed general administrator and guardian, binds the sureties on each bond for only the administration of estates committed to their principal for the term for which their bonds were executed. This rule, however, does not apply to bonds given under §§ 2405-7 of the Code.

APPEAL* from Circuit Court of Mobile.

Tried before Hon. HARRY T. TOULMIN.

This was an action commenced by the appellant, H. B. Buckley, one of the distributees of the estate of W. W. Buckley, deceased, against the appellee, McGuire, and the sureties on his bond as general administrator of Mobile county, to recover for an alleged devastavit committed by McGuire, in the administration of the estate of said Buckley.

McGuire was appointed general administrator of Mobile county in 1864, gave bond, which was approved, and acted under it for the term of four years. During that term, in September, 1865, the estate of Buckley was, by the order and appointment of the Probate Court of Mobile county, committed to his charge as such general administrator, and he entered upon the discharge of the trust.

In 1868, McGuire was again appointed general administrator, being his own successor, and gave bond with sureties for this second term. This bond was also approved and McGuire acted under it. No order or appointment was ever made committing the estate of Buckley to McGuire, save the order above referred to, of September, 1865. The condition of the bond sued on is, that "said W. W. McGuire shall faithfully administer all estates which may come to his charge as such general administrator." In the final settlement of McGuire's administration of Buckley's estate, had long after 1868, decrees were rendered against him in favor of the several distributees, and this suit is brought by one of them against him and the sureties on the bond of 1863, to recover the amount of the decree against him on such settlement

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The defendants filed several pleas, asserting, in substance, that the liability of the sureties was confined to estates which were committed to the charge of McGuire during the term for which the bond was given, and averring that Buckley's estate came to his hands before the bond sued on was executed, and hence the sureties on the bond were not liable. A demurrer to this plea was overruled and judgment rendered for the defendants. By the second section of the act of December 14, 1859, under which McGuire was appointed general administrator and guardian of Mobile county, it is provided, "At the expiration of the term of said office, unless the same person be reappointed, or in case of a cessation of his authority as such general administrator, such person shall proceed to settle up all administrations in his hands, at as early a day as the law and the situation of the estates will permit, subject to removal as aforesaid." By this act the term of office of the administrator general was four years. The clause of the act in relation to guardianships, is as follows: "All matters of guardianship which may have been entrusted to such appointee, and the property under his control belonging to any ward, shall be immediately turned over to such person as may be appointed to succeed him in said office."

GIBBONS & PRICE, for appellants.—No new order or letters were necessary to place Buckley's estate in McGuire's charge; he held it by virtue of his former appointment, and he was his own successor; and upon his reappointment, all its effects then in hand *came instantaneously* to his charge by operation of law, and his bondsmen are liable for the rightful administration of them.—See 39 Ala. 286; 8 Ala. 27; 42 Ala. 666, and cases cited.

BOYLES & OVERALL, J. LITTLE SMITH, E. S. DARGAN, and GAYLORD B. CLARK, *contra*.—The securities on the bond of 1868, only contracted that McGuire should faithfully administer all such estates as may come into his hands as such general administrator. Buckley's estate was already in his hands. It was for the future, not the past faithfulness of McGuire, that the sureties agreed to be responsible. The bond must speak for itself, and its language can not be extended or altered to the injury of the surety.—1 McLean, 493; 5 Peters, 373.

STONE, J.—The question argued in the present case, arises out of the construction of the act, "Authorizing the appointment of general administrator and general guardian

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for Mobile county, and for other purposes," approved December 14, 1859.—Pamph. Acts, 551. McGuire was appointed general administrator and guardian in 1864, gave bond, which was approved, and acted under it for the term of four years. During that term, viz: in September, 1865, the estate of Buckley was, by the order and appointment of the Probate Court of Mobile county, committed to his charge as such general administrator, and he entered upon the discharge of the trust.

In 1868, McGuire was again appointed general administrator and guardian, being his own successor, and gave bond with sureties, for this second term, in substantially the same form as the first. This bond was also approved, and McGuire acted under it. No order or appointment was ever made committing this estate of Buckley to McGuire, save the order above referred to, of September, 1865. The condition of the bond sued on, is that "said W. W. McGuire shall faithfully administer all estates which may come to his charge as such general administrator and general guardian." In the final settlement of McGuire's administration of the Buckley estate, had long after 1868, decrees were rendered against him in favor of the several distributees, and the present action is brought by one of them, on the bond last executed, to recover the amount of such decree. The Circuit Court ruled that the bondsmen of 1868, were not liable for McGuire's default, in the administration of an estate committed to his charge in 1865.

As a rule, sureties have the right to stand on the very terms of their contract; and no default can be charged against them, unless it falls within the condition of their bond.—2 Brick. Dig. 374, § 18. The bond in this case binds the administrator faithfully to administer only such estates as *may come* to his charge. These words are purely prospective in their import, and can by no fair interpretation be held to embrace estates that had previously come to his charge. But we think the argument is stronger than this. The statute makes no provision for turning over an unfinished administration, by an outgoing general administrator, to his successor. The language is, he "shall proceed to settle and close up all administrations in his hands, at as early a day as the law, and the situation of any estate will permit." The phrases *close up* the administration, and, at as early a day as the *situation of the estate* will permit, have a clearly defined, sensible meaning, if we hold they refer to a complete administration of the estate, and the settlement thereof. They are inapt and out of place, if we declare it is the duty of such out-going administrator to turn unfinished adminis-

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trations over to his successor. And the clause, in reference to the general guardian, being entirely different, is a further argument in favor of this construction. Its language is, that in "all matters of guardianship which may have been intrusted to such appointee, and the property under his control belonging to any ward, shall be immediately turned over to such person as may be appointed to succeed him in said office," &c. Why this entire change of language, if his duties under each class of trusts was intended to be the same? True, if the general administrator dies, resigns, or is removed for any of the statutory causes, then it would become necessary to commit unfinished administrations to other hands. That is implied in the words, "subject to removal as aforesaid." That is, he must settle and close up all administrations with which he is charged during his term, at as early a day as the law and the condition of the estate will permit, subject to removal as aforesaid. The provisions for his removal are shown in sections 2405-6, Code of 1876. These relate to orders requiring new bonds, and failure to give them. The only clause of the statute which seemingly militates against this construction, is expressed in the words, "unless the same person may be reappointed." These words are in precise harmony with the clause which declares the duties of an out-going general guardian, stated above, when *the same person is not reappointed*. They do not so well agree with our construction of the duties of the general administrator, when he is appointed his own successor. The statute does not, in terms, apply to such a case as that. But other clauses of the statute, noticed and construed above, and the condition of the bond sued on, force us to hold that, no matter how frequently the same person may be reappointed general administrator and guardian of Mobile county, the sureties on each bond are only bound for the administration of estates committed to their principal during the term for which their bond was executed. This rule, however, does not apply to bonds given under sections 2405-6-7 of the Code of 1876.

We consider it unnecessary to notice the various rulings in this case, for under no circumstances can the plaintiff recover.

Affirmed.

[McCrary v. Slaughter.]

McCrary v. Slaughter.*Action on Promissory Note.*

1. *City court of Selma; duty of appellate court on reviewing finding on facts.* Under the statute establishing the city court of Selma, there can be no presumption in favor of its findings on facts, in civil cases, tried without the intervention of a jury, when brought before this court on appeal; and if the appellate court finds error of law or fact in such judgment, it must reverse and render judgment, or remand the cause, as seems proper in the particular case.

2. *Partnership; what constitutes.*—A joint undertaking and community of profit and loss, in the results of the business, constitute a partnership, although each partner retains the exclusive ownership of the separate property contributed by him to the use of the partnership.

3. *Same; what does not authorize partner to make or endorse promissory note in name of.*—An ordinary partnership for planting or farming in the cultivation of land, does not involve the power of each partner to bind the partnership, or his copartners, by making a promissory note in the partnership name.

4. *Same.*—In an agreement for such a partnership, an express stipulation that one partner shall furnish the mules necessary for the business, and that neither shall bind the other by contracts, excludes the inference of authority in the other to bind the partnership by the purchase of mules; and such power can not be implied, as a matter of law, from the nature and purposes of the partnership.

APPEAL from City Court of Selma.

Tried before Hon. GEO. H. CRAIG.

The appellee, Slaughter, brought suit in the Circuit Court against appellant, McCrary and one Blair, to recover the amount of a promissory note, which the complainant averred was "made by them under name of Blair & Co." There was a discontinuance as to Blair, who was not served, and McCrary pleaded "*non est factum*." The suit was afterwards transferred to the city court of Selma, where, under the rules of the court, a trial was had without the intervention of a jury.

The material facts of the case were as follows: In the year 1867, McCrary had bought and paid for a half interest in a plantation, and Blair had bargained for and was in possession of the other half interest. The two entered into an agreement to cultivate the place that year, which was reduced to writing. This writing had been lost, and the court allowed secondary evidence of its contents. The substance of this contract was, that McCrary was to furnish the land, and a certain number of mules (which he did), and half the laborers; and Blair was to furnish the other half of the labor-

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ers, and his own services, and after paying the expenses, each bearing his own proportion, the proceeds of the crops were to be equally divided between them. It was, also, expressly agreed between them "that neither was to have the right or authority to sign each other's name," or, as Blair expressed it, "neither of us should bind the other by any trade or contract he might make."

McCrary lived in Kentucky, and the plantation was managed by Blair. In the spring of 1867, Blair bought three mules from plaintiffs' agent on a credit, until the first of June following. The agent testified that he sold the mules to the firm, and would not have credited Blair alone; and, afterwards, in August, Blair executed a note for the price, signing it Blair & Co. This was the only time he ever signed the firm name, and it is not shown whether they ever held themselves out as partners, or contracted any debts under a firm name. McCrary was in Kentucky at the time, and did not know of the matter for some time afterwards. Blair testified that he informed Slaughter's agent that he had no authority to sign McCrary's name; but also stated that he was interested in the crop, and the mules were for the benefit of all of them, and Slaughter's agent still insisting, after this, Blair signed the note in the name of Blair & Co. The testimony tends to show that McCrary never acknowledged any liability for the purchase, but, on the contrary, denied it; though, "to help Blair out," he authorized him to use a note, which belonged to them both, to take up the note given for the mules; which offer the plaintiff refused. These mules remained at work on the plantation until the crops were gathered, when Blair sold them to pay some of his debts incurred in the planting operations. McCrary shipped supplies to the plantation to carry on farming operations. Blair testified that he bought the mules because "McCrary was absent in another State, and some of the mules on the place had proved to be insufficient," and in his judgment [Blair's] the purchase of additional mules was "necessary to the making of a crop; and, the plantation being under my management, I deemed, under the circumstances, that my duty to him, as well as myself, required that I should purchase the mules." Nothing was made by the farming operations, and there had never been any settlement between McCrary and Blair.

There were some exceptions to the admission of evidence, not material to be noticed in the view which this court took of the case. The court below rendered judgment for the plaintiff, to which McCrary excepted; and he now assigns it for error.

[McCrary v. Slaughter.]

MORGAN, LAPSLEY & NELSON, for appellants.—The agreement in this case is very like that before the court in *Moore v. Smith* (19 Ala. 774), in which it was held that the farming contracts did not constitute a partnership *enter sese*. For a proper definition of such agreements, see *Counts v. Happel*, 49 Ala. 254, and *Randle v. State*, 49 Ala. 15. Mr. Story says, if no partnership was intended, and the parties have not held themselves out as partners to the public, they should not be held partners as to third parties.—Story on Partnership, § 49. After the plea of McCrary, it devolves on the plaintiff to prove the partnership.—33 Ala. 255. The evidence does not prove it. This court, on reviewing the ruling of the court below on evidence, is forbidden by statute to indulge any presumptions in its favor. But, admitting the partnership, Blair had no authority to bind McCrary by giving a note for mules.—*Cocke v. Branch Bank Mobile*, 3 Ala. 178. See, also, *Judge v. Braswell*, decided by Court of Appeals, of Kentucky, March 27th, 1877.

FELLOWS & JOHN, *contra*.—The contract between Blair and McCrary most certainly made them partners as to third parties.—Story on Partnership, §§ 54-58; Story on Contracts, §§ 204-6. An agreement restricting the rights of the partners to bind each other, was of no force as to persons dealing with the firm.—41 Ala. 283. The evidence shows that the mules were necessary to carry on the farming operations. McCrary knew the mules were on the place. They worked in making the crops, and the partnership got the benefit of the crop. This bound McCrary, although he knew nothing of the original contract. It was a ratification of Blair's act in giving the note.—11 Ala. 534; 10 Paige, 126. The agreement that neither partner should bind the other, can not change the law of copartnership as to matters within the scope of the partnership. The character of the business, and the facts of the case prove the necessity for the exercise of this power. Although no presumptions are indulged in favor of the finding of the city court on the facts, the statute does not authorize the appellate court to indulge in presumptions against its findings; and this court can not reverse, unless it can see that the court below was wrong.—*Marlow v. Benaugh*, 52 Ala. 113.

BRICKELL, C. J.—The statute establishing the City Court of Selma, provides that civil causes at law, pending in the court, shall be triable by the court without the intervention of a jury, unless the plaintiff, at the commencement of the suit, or the defendant at the time of appearing and plead-

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ing, shall demand a trial of issues of fact, by a jury; or, if the cause is introduced into the court, by transfer from the Circuit Court of Dallas county (which is authorized), at the time of application for transfer, a trial by jury is demanded. It is further provided, if the cause is tried by the court without a jury, not only questions of law, but "the conclusion and judgment of the court upon the evidence," may by bill of exceptions be presented to this court for review. In reviewing the judgment of the court upon the evidence, the mandate of the statute is, *there shall be no presumption in favor of the ruling of the City Court*. If this court finds error, whether of law or of fact, such judgment as the City Court ought to have rendered, may be rendered, or there may be a reversal and remandment, as to this court may seem right.—Pamph. Acts, 1875-6, p. 390, §§13-14.

This cause was originally commenced in the Circuit Court of Dallas county, and transferred to the City Court, where a trial was had by the court without a jury. Judgment having been rendered in favor of the appellee, who was plaintiff, a bill of exceptions was taken, setting out all the evidence, and we are required to determine the correctness of that judgment rather than any special rulings of the court. There are exceptions to the admission of evidence, not important in the view we take of the case, and we pass them, directing our attention to the consideration of the question, whether the evidence discloses that the appellee was entitled to recover.

The primary question is, whether a partnership existed between the appellant and Blair, who made the promissory note, the foundation of suit; and if such partnership existed, whether this contract was within its scope, and within the capacity of either partner to bind the partnership. The evidence in reference to the facts which must control the decision of this question is, fortunately, without conflict, and we are not embarrassed by the difficulties which must attend the revision of questions of fact under this statute, when the evidence is oral, and the witnesses are contradictory and conflicting in their testimony. The facts are, that appellant was the owner of an undivided half of a plantation, situate in Dallas county, and Blair, though not the owner, had possession, and the right to occupy the other undivided half. In 1866 and 1867, it was cultivated by the appellant and Blair, each furnishing one-half the labor, and the appellant furnishing the mules, or the necessary team, and Blair devoting his personal services to the supervision of its cultivation, and the expenses of the plantation to be borne by them equally, the proceeds or profits of the crops to be

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equally divided between them. These facts embrace every element of a partnership. There was a union of the use and occupancy of the lands, of the mules or team provided by the appellant, of the labor each party furnished, of the skill and service of Blair in supervising the cultivation, community in the expenses of the plantation, and in the proceeds or profits of the crops. It may not have been, and was not contemplated, that either party should acquire any right or interest in the property, the other contributed to the joint undertaking. It is not necessary to constitute a partnership, that there should be property forming its capital, jointly owned by the partners. The property employed in the partnership business may be the separate property of the partners, but if they share in the losses and profits arising from its use, a partnership exists.—*Champion v. Bostwick*, 18 Wend. 183. If there is a joint undertaking, and a community of profit and loss, each party sharing in these mutually, and having a specific interest in the profits, not as compensation for services rendered, but as an associate in the undertaking, the relation of partners is formed.—*Collyer* on Part. Ch. 1. The obvious difference between this case and that of *Moore v. Smith*, 19 Ala. 774, to which we are referred, is the community of profit and loss in which Blair and the appellant were to participate. If there was no profit, neither had a specific interest in the crops or their proceeds. If there was a loss, each was bound to contribute equally to make it good; while in the case cited, Smith had a defined interest of one-fourth in the crops, as compensation for his services, without regard to the profit or loss resulting from the farming operations.

In commercial partnerships, the general principal is, that either partner, by virtue of the relation, is the general agent of the partnership, and has capacity to bind it by any contract or engagement, within the scope of the partnership business. Restraints on this capacity, imposed by the partnership agreement, are operative only between the partners themselves. They are not limitations of authority, as to third persons, dealing in ignorance of them, on the faith of the general nature and character of the partnership, and its business.—*Mauldin v. Br. Bank Mobile*, 2 Ala. 205; *Callin v. Gilder*, 3 Ala. 536; *Story* on Partnership, § 101. But one partner has not, without the consent of the others, power to bind the partnership, though he contracts in the firm name, by any contract not connected with and without the scope of the partnership business. The authority with which he is clothed, and on which strangers dealing with him as the representative of the partnership, have the right to rely, re-

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fers, and is confined to the business of the partnership; and of the extent and character of that business, and the authority it involves, they must take notice at their own peril.—*Cocke v. Br. Bank Mobile*, 3 Ala. 175. If the contract is not necessarily or usually incident to the business transacted by the partnership, the partner contracting is alone liable, unless the other partners have assented to it.—1 Am. Lead. Cases, 545.

In the application of these general principles, regard must be had to the nature and objects of the partnership, and the business it is formed to transact. A partnership may be formed for the transaction of any lawful business, and partnerships exist in most if not all professions, trades and occupations. Some branches of business and some classes of pursuits involve, from their very nature, power and capacity, in either partner, more limited than that of necessity resulting from others. Commercial partners have an implied authority to borrow money, to draw or indorse bills of exchange or promissory notes, in the firm name, binding the partnership, because these acts are incident to the nature of the partnership business, and may be necessary for its transaction. But partners in the practice of law or of medicine, have no such authority, because such acts are not connected with and are foreign to the nature of the partnership and the objects for which it is formed.—Am. Lead. Cases, 545. If a partnership is formed for, and engaged in buying and selling goods, it is not within the scope of its business to receive and undertake to collect promissory notes, or other evidences of debt; and one partner, by undertaking their collection, would impose no liability on the partnership, though contracting in its name.—*Hogan & Co. v. Reynolds*, 8 Ala. 59. This would lie precisely within the range of the business of partners in the practice of law, as that business is known to be here pursued. Uncontrolled by evidence of usage, which in doubtful cases may determine the inquiry, the test to which the particular transaction must be subjected is, whether it is appropriate to the business in which the partnership is engaged.—Story on Part. §§ 111-113. If it be not, the partnership is not liable, but only those partners entering into or assenting to the transaction. Partnerships in planting, or in farming, do not involve the power in each partner to borrow money, or to draw or indorse bills of exchange or promissory notes, because such power is not necessary or appropriate to the business.—Collyer on Part. § 402, p. 366; Story on Part. § 126. In *Lea v. Guice*, 13 Sm. & Mar. 656, a dormant partner, the partnership business being planting, was charged with a promissory note given by the ostensible partner in consideration of the loan of a promissory note of a third

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person, which was used as money in paying a debt of the partnership for overseer's wages. The articles of partnership were in evidence, and as construed by the court, conferred on the ostensible partner large discretion in the management of the plantation, and authority to conduct it according to the necessities, usages, and customs of persons engaged in the business of planting. As the partnership was secret, evidence that it was the usage of planters generally to borrow money and make promissory notes in the course of their business was received. The case has its peculiar facts, which controlled its decision. It is not intimated, that as matter of law, it can be declared from the nature, objects, and business of a planting partnership, that each partner can bind the partnership by making or indorsing promissory notes. It seems to us such power is not involved in the business of such partnerships, now becoming more frequent than formerly. The object and business for which they are formed is the cultivation, gathering, and sale of annual crops. It may be necessary to contract debts, in the course of the business, on short credits, maturing at or about the time the crops will be ready for sale; but it is not necessary to draw or indorse bills of exchange or promissory notes. If such a power was implied, it would, contrary to the intention of the partners, involve not only the property each partner contributed to the joint undertaking, but his entire credit and all his individual property. The business does not, as does the trade of merchants, include such power, and we cannot indulge the presumption that it is usually conducted by such instrumentalities.

Though the note may not impose liability on the appellant, he may be liable on the original consideration, if Blair had authority to bind the partnership by the purchase of the mules. The successful prosecution of the joint undertaking required the employment and use of mules or horses suitable for plowing, hauling, ginning, and, it may be, other work necessary in planting, cultivating, gathering, and rendering marketable the crops produced. It is not insisted that Blair had any express authority to make such purchases, and bind the partnership for payment. The stipulation in the partnership agreement, that the appellant should furnish the mules necessary, as a part of his contribution to the joint undertaking, excludes the idea of such authority, as does the stipulation that neither party should by any contract bind the other. The inquiry then is, whether the authority can be implied as a matter of law from the nature and character of the business. When a contract is made by a member of a commercial partnership, the business of the part-

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nership being shown, and the nature of the contract, as matter of law, the court can generally determine whether it falls within the implied power of the respective partners. But if the partnership is not commercial, it is a matter of difficulty to ascertain whether a particular transaction, not indisputably within the scope of the partnership business, falls within the power of each partner which may be implied. In such cases it is said by Judge Story: "To answer the inquiry satisfactorily, it is not enough to show that in other trades or other business, certain rights, powers, and authorities are incident thereto, and may be lawfully exercised by each of the partners; but we must see that they appropriately belong to or are, by usage or otherwise, implied or incidental to the particular trade or business in which the partnership is engaged." If a planting or farming partnership has any joint property, from its business, we would naturally suppose, it was the land it was cultivating, the team, and implements employed in the cultivation. These must exist and be in the possession of the partnership at the inception of its operations. They are usually contributed by the respective partners at the time of entering on the joint undertaking, in such proportions as the agreement of partnership requires. Contracts for their purchase, made by one partner without the concurrence of the others, are not necessary or appropriate to the business. Such contracts are supported only when it is necessary to the successful conduct of the partnership business that power in the partner to make them should be implied, or the exercise of such power is according to the usages and customs of the business. If a power to purchase mules could be implied, the same implication would support a contract for the purchase or rent of land, or for the purchase of a gin, and the limit of the implication it would be difficult to define. If a court cannot clearly see, in reference to these non-commercial partnerships, that a particular contract made by one partner is necessary to the successful prosecution or in accordance with the usages of the business, it is better to let it stand or fall upon the express authority which may have been conferred, or on the assent of the partners, than to indulge implications to support it.

It is scarcely necessary to add that the evidence fails to show that the appellant assented to or ratified Blair's contract of purchase.

We are of opinion the City Court erred in rendering judgment against the appellant, and its judgment must be reversed, and the cause remanded.

[Hooks v. Anderson.]

Hooks v. Anderson.*Action on Promissory Note.*

Indorsement in blank of commercial note; liability of endorser.—A person who writes his name in blank on the back of a note, negotiable and payable in bank, before it has been endorsed or put in circulation by the payee, is bound as though he made a perfect endorsement to another person; and the payee can not recover of him, without proof of a demand for payment at maturity, and due notice of non-payment.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

The appellee, Diana Anderson, brought suit against Turner and Hooks, as makers "of a promissory note made by them on the 25th day of October, 1873, payable ninety days after date, to the order of the plaintiff, at the Southern Bank of Alabama."

Turner made no defense, and judgment by default was rendered against him. Hooks pleaded the general issue. A jury trial was waived, and the decision of the case submitted on an agreed state of facts. The note sued on was as follows:

MOBILE, Oct. 25th, 1873.

Ninety days after date I promise to pay to Diana Anderson three hundred and seventeen dollars and fifty cents, at the Southern Bank of Alabama, for value received,

HENRY TURNER.

Endorsements on the back of the note:

	her
S. W. HOOKS.	DIANA \bowtie ANDERSON.
	mark.

It was shown by the agreed state of facts that "Henry Turner, desiring to borrow some money from the plaintiff, proposed to give her a note signed by himself and some good and solvent person; that some days afterward he brought her the note signed by himself and said Hooks; that she knew Hooks and believed him to be good and solvent. Hooks had signed said note at the request of Turner and for his benefit, to add strength to the note, and to enable Turner to get money on it. Plaintiff, on these facts, gave Turner the money and received the note. She would not have parted

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with the money without the signature of Hooks or some other person becoming liable therefor with said Turner."

The court held that Hooks was liable to the plaintiff, and accordingly rendered judgment in her favor against Hooks, who excepted, and now assigns the ruling and judgment as error.

E. S. DARGAN, for appellant.—The law has long been settled in this State in favor of appellant.—*Jordan v. Garnett*, 3 Ala. 610; *De Yampert v. Milton*, 3 Ala. 648. If, however, it should be held that Hooks' is a regular indorsement, and the appellee is first indorser, then Hooks was discharged, because the note was not protested, and no demand made, nor notice given to Hooks.—*Price v. Lavender*, 38 Ala. 389.

BOYLES & OVERALL, *contra*.—Hooks put his name on the back of the note to enable Turner to borrow money. This made Hooks liable as principal.—*Rey v. Simpson*, 22 Howard, 350. Justice CLIFFORD says: "If he puts his name on the back of the note for the maker, at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or, if he participated in the consideration for which the note was given, he must be considered as joint maker of the note."—See, also, *Price v. Lavender*, 38 Ala. 389.

MANNING, J.—The note, on which this suit was brought, is negotiable and payable in bank—what is called commercial paper. It is made payable to appellee, (the plaintiff below), and was delivered to her with the name of the maker, Turner, at the end of it, in the proper place, and that of Hooks indorsed on the back; and these two persons were sued together as joint makers. Judgment by default was taken against Turner, and upon issue made by Hooks, judgment was rendered against him. No demand of payment of the note was made at its maturity and notice of non-payment given to Hooks; nor is there any excuse shown for not having done so. The only question is, whether or not, he was liable in this action and upon this state of facts.

The rule of decision in such cases in this State, was established many years ago. In *Jordan v. Garnett* (3 Ala. 610) the defendant's name was written on the back of an ordinary note, not commercial, when it was delivered to the payee. ORMOND, J., said, that defendant intended to bind himself as maker of the note, could not be supposed, for if he had he would have written his name at the bottom of the note. Neither was it a fair inference that the indorsement was

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intended as a mere guaranty that the note would be paid at maturity; for such would not have been the effect of a regular assignment of the paper; and in the absence of proof it could not be presumed that the parties contemplated a greater liability than would be created by a regular assignment if the title had been in the assignor. The assignor of such a note would be liable, under the statute, for the amount of the note, only in the event a suit against the maker should be brought to the first term of court to which it could be brought after the maturity of the note. And it was, therefore, *held* that the undertaking of the defendant was an affirmation or warranty that the note, when due, could be collected, by due diligence, from the maker; and that, if no valid excuse existed, the maker must be sued to the first court after the maturity of the note, or the indorser would not be liable.

The same question arose upon a like irregular indorsement of commercial paper like the present, (a note negotiable and payable at the bank) by a defendant, to whom it had not been indorsed by the payee, in *Milton v. De Yampert*, (3 Ala. 648). Judge HENRY GOLDTHWAITE, speaking of the case of *Jordan v. Garnett*, *supra*, said: "We held that one who placed his name on an assignable, as distinguished from a negotiable, security, was not to be presumed to take upon himself a greater liability by such a blank signature, as is here shown, than he would have incurred by a regular indorsement. The same rule must be applied to this case, but the legal result is somewhat different, and this arises from the fact, that in this case, the note is negotiable and payable in bank." That able judge then argued that, as such an irregular indorsement is connected with and dependent upon the note or writing upon which it is made, it must import a liability ranging according to the nature of such note, and "that the liabilities of imperfect indorsements must be referred to and deduced from the securities on which they are found." And hence, he concluded that the imperfect indorsement must be governed by similar rules to those applicable to perfect indorsements, and that in the absence of any excuse, a similar degree of diligence is necessary to charge one who becomes bound by an imperfect indorsement, as is necessary to charge an actual indorser."

In the course of the investigation, alluding to the diversity in the decisions of similar cases in other States, Judge GOLDTHWAITE said: "In such a condition of adjudication, we are thrown upon principles, and it is evident that we must get our answer from the paper itself." And afterwards, when he had enunciated the rule above stated, he

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says: "We have not been able to perceive that any other general rule can be deduced from elementary principles, capable of covering all cases in which imperfect indorsements may be made."

This decision has ever since been considered as establishing the law in such a case, and it is so referred to by WALKER, C. J., in *Price v. Lavender*, 38 Ala. 389. He says: "Whatever may be the law in other countries, the law is settled in this State with respect to such indorsements, that, unexplained, they impose a liability in favor of the person to whom the indorsement is made against the indorser, which is strictly analogous to the liability upon a regular indorsement."

These decisions constrain us to say that the judge of the Circuit Court erred in his ruling.

Let the judgment below be reversed, and the cause be remanded.

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Real Action in the Nature of Ejectment.

1. *Common title; source of; who can not deny.*—Where plaintiff and defendant claim under a common source of title—the one by conveyance at execution sale of the property of a corporation, and the other under deeds of trust executed by it—neither can deny the source of their common title; and the plaintiff can not assert the want of power in the corporation to acquire the property, and to convey it by mortgage; if, however, the property had been acquired by a contract which remained executory, either party in a suit to enforce the contract, might raise the question as to the power of the corporation to acquire such property, and upon showing that the contract was *ultra vires*, could defeat recovery; so, also, the inquiry would be material in a proceeding to vacate the charter for *misuser*, or to set aside the contract, as without the pale of corporate authority.

2. *Charter of railroad company, and mortgages construed.*—The charter of a railroad company empowered it, among other things, to construct and operate a railroad between the cities of Mobile and New Orleans, and to acquire and hold such real property "as may be necessary and convenient, for the construction, maintenance and management of the railroad," and also to acquire "any steamboats, piers, wharves and the appurtenances thereunto belonging, that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage, in connection with said railroad."

In deeds of trust, executed by the railroad corporation, the words of conveyance were qualified by clauses like the following: "The lands occupied by said railroad, or hereafter acquired, owned and occupied . . . including all depots, &c., now owned and occupied, or hereafter acquired in connection with said portion of said railroad, situate upon or lying within the limits of said cities, or upon or adjacent to said portion of said railroad, and the route

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and line thereof." In another mortgage or deed of trust, the conveyance was qualified as follows: "All depots, station-houses, wharves and warehouses now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad, together with all steamboats, and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." *Hehl*,

1. The charter authorizes the corporation to acquire and hold property to be used in the construction, maintenance and operation of the road, or in connection therewith; but not the acquisition of property not needed or used, for one of these purposes, or in connection with such purposes.

2. The mortgages conveyed only such property, real or personal, as was useful and necessary and employed in the construction, maintenance, operation, repair and preservation of said railroad; and property acquired and owned, and not used or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, did not pass.

3. Property bought of an opposition steamship line, not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, was not authorized to be acquired by the charter, and not covered by the granting clauses in the mortgages.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

The appellee, Isaac Donovan, on the 9th day of October, 1873, brought a real action in the nature of ejectment against John A. Jacques, to recover certain wharf lots in the city of Mobile. The case was continued for several terms, and tried in June, 1876. Jacques had surrendered possession after suit was brought, and the appellants, E. D. Morgan and James A. Raynor, trustees under a deed of trust made by the New Orleans, Mobile and Chattanooga Railroad Company, (then the New Orleans, Mobile and Texas Railroad Company), on the 1st day of January, 1869, and who had been in possession since February, 1875, claiming title, were, by consent, substituted in place of Jacques, who was discharged; and they pleaded not guilty.

In an agreement made between the parties, it is recited that "the trustees entered and hold possession under the orders of the Circuit Court of the United States, in a suit therein pending in the city of New Orleans for the District of Louisiana, which, by its terms, put and confirmed them in possession as trustees and receivers of the property conveyed and described in said deed of trust; but it is agreed that this suit is to proceed against said Morgan and Raynor as if the Circuit Court had assented to the same, and leave had been given to plaintiff to sue the said Morgan and Raynor."

The property in controversy was conveyed to the New Orleans, Mobile and Texas Railroad Company, by one Charles Morgan, on the 12th day of December, 1871, which conveyance was duly recorded. It consists of four wharves or wharf lots, on Mobile river, fronting on Front street on the

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west, and Government street dock and wharf on the south. Plaintiff deduced title as follows :

Donovan obtained judgment against the railroad company on the 28th day of February, 1873, execution received by sheriff March 17th, and levied March 18th, 1873, on the property in controversy. Two other persons had also recovered judgments against the company. Execution on the first of these came into the sheriff's hands February 19th, 1873, and was levied on the same property March 13th, 1873; on the second, execution was received February 11th, 1873, and levied on the same property, on the same day. On the 14th day of June, 1873, he sold and conveyed the premises to Donovan, plaintiff in this suit, who, before bringing it, demanded possession.

The evidence shows that the New Orleans, Mobile and Texas Railroad Company took possession early in the year 1872, employing Jacques as wharfinger, "to keep the property in repair, to contract with steam-boats and vessels for the use of the property, in receiving and discharging cargoes, and to collect wharfage from merchants and others who might desire to receive or ship freight over the same." The property was "not adjacent or contiguous to any other railroad property, but was separated therefrom by blocks of stores belonging to private owners, public streets, and by Government street wharf, and also partly by an empty or vacant dock." A map, showing the *locus in quo*, and the situation of the railroad depot, was introduced in evidence; but it has been impossible to procure a lithograph of it, so that it might be here incorporated. The testimony also showed, that the property had "never been used as appurtenant to or in connection with said railroad, or in receiving or shipping freight from or to said railroad, or for railroad purposes." There was testimony that on one occasion a temporary track was built that a car might get on the wharf, and a car was so put on the wharf. It seems, however, that this was not a *bona fide* use, having occurred after levy of the executions under which the sale and deed were made to plaintiff in this suit. The cars could be moved on this track "only by use of crow-bars and tackle, having to be constantly shifted, to get them around the street corners." This car and track were soon removed, the track being an insecure and temporary affair.

It was shown that the wharves were acquired by the railroad company, under a contract with Morgan, which was intended "to adjust various matters in controversy, and to establish harmonious relations between them. Morgan had been running a line of steamers between Mobile and New Orleans. Under this contract the line was withdrawn

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shortly afterwards, and after the boats were taken off, the company took possession." The road was completed between Mobile and New Orleans about a year before the contract was made; and both the contract and deed bear date December 12th, 1871.

Jacques remained in possession of the property until November, 1873. The New Orleans, Mobile and Chattanooga Railroad Company, which was authorized by its charter to construct and operate a road between Mobile and New Orleans, had, in the meantime, changed its name to that of the New Orleans, Mobile and Texas Railroad Company, and having defaulted in the payment of interest on the 22d day of March, 1873, surrendered its property to Gardner & Butler, trustees of the second mortgage, who had the same foreclosed in the United States Court for the District of Louisiana. A sale was made in June, 1873, which was confirmed by that court, and a deed made to the trustees on June 14th, 1873, who purchased in behalf of the bondholders, secured by this second mortgage, who organized a corporation under the old name of the New Orleans, Mobile and Texas Railroad Company. In February, 1875, default having been made in the payment of interest, secured by the first deed of trust, possession of its property was delivered to Morgan and Raynor, trustees in said deed, (Raynor having been appointed in place of Oakes Ames, deceased,) and they filed a bill for foreclosure, and for their appointment as receivers in the meantime. The United States Court for the District of Louisiana, in which the bill was pending, appointed them receivers accordingly, confirming them in their possession of the property conveyed by the mortgages, &c.

The first mortgage spoken of, was executed January 1st, 1869, and the second mortgage on the 8th day of April, following, and both were duly recorded. A very full statement of the provisions of these mortgages, as also of the charter of the company, is given in the opinion, and need not be here repeated.

This was substantially all the evidence, and the court, at the request of the defendants, charged the jury in writing, after stating the claim of title of the parties, as follows:

"From this concise statement of the case it will be seen that the controversy arises between the titles of the parties. The whole question is, therefore, did the title pass under the trust deeds to the defendant? Do the deeds cover the property? If so, the plaintiff has no title and cannot recover here. The land and wharves in question were not owned by the railroad company at the time the mortgages were execu-

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ted and are not named or described therein, but were subsequently acquired. If they were used and managed in connection with the railroad; if they were essential to its use and enjoyment; if they were held by the company for legitimate railway purposes, then they did pass by the deeds, and plaintiff cannot recover. Now, the company was authorized to acquire lands and wharves, and mortgage them; as to this there is no dispute, but that the company mortgaged the lands and wharves in question is disputed. The particular lands which were to be acquired, after the trust deeds were executed, must necessarily be lands that the company was authorized to acquire for legitimate purposes, for its legitimate use, and that were reasonably in contemplation of the parties at the time the trust deeds were executed.

"If the land in question, when acquired, was appropriated to corporate objects and uses, and is necessary for the enjoyment and exercise of any franchise of the company, although acquired after the execution of the deeds, it passed by the trust deed; but if not dedicated to corporate purposes, if not necessary for the enjoyment and exercise of any franchise of the company, it did not pass, and was liable to the legal claims of other creditors, and this plaintiff must recover; and it is referred to you, gentlemen, to ascertain this question of fact, under the legal rules above stated. I charge you, then, in substance:

"If you believe from the evidence that the property described in the complaint is the same property that is described in the four deeds from Rufus Dane, sheriff of Mobile county, to the plaintiff, and that the said lands and wharves are the same which were conveyed by Charles Morgan and wife to the New Orleans, Mobile and Texas Railroad Company, and that the said lands and wharves were purchased by said railroad company after the completion of said railroad between Mobile and New Orleans as the same is now constructed, and that the said property is not connected with the said railroad nor contiguous nor adjacent thereto, and is not necessary, nor is, nor has been used for railroad purposes by said railroad company, but is entirely disconnected from said railroad and all of its other property, then you must find for the plaintiff."

"To which instructions, so given by the court, in writing, as requested by defendants, they, the said defendants, excepted."

Thereupon the defendants requested the court, in writing, to give the following charges:

"1. If the jury find that the property lies within the city of Mobile, and was owned by the New Orleans, Mobile and

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Texas Railroad Company, under a conveyance from Charles Morgan, and that there has been a default in payment of interest, as set forth in the records in the cases of Gardner and Butler, and Morgan and Raynor, the defendants have the best right, and plaintiff can not recover.

"2. If the property described lies within the city of Mobile, and is wharf property, purchased by the New Orleans, Mobile and Texas Railroad Company, and near its line of railroad, subsequently to the mortgage, it is included in the terms of the mortgage; and if defendants are in possession under their deed, and orders of the United States Court at New Orleans, they are rightfully in possession, and plaintiff can not recover.

"4. If the property lies in the city of Mobile, and is situated in connection with the railroad depot and railroad, as shown in the map and evidence of location; and was acquired of Charles Morgan, as by his deed, and was possessed by the company until surrendered to Gardner and Butler, and it was held under that deed till the entry of Raynor and Morgan, then the wharves are included in the mortgages, and the verdict should be for Raynor and Morgan; and that, under the decrees, sales and other proceedings in the Circuit Court of the United States, the defendants are entitled to possession and a verdict."

The court refused these instructions, and the defendant excepted.

The plaintiff then requested the following charges, in writing, which the court gave, and the defendants excepted:

"A. If the jury believe that the property described in the sheriff's deeds to Donovan is the same described in the complaint, and that the property described is not connected with or adjacent to said railroad and is not used for railroad purposes, and is not necessary for the convenient use and operation of said railroad, they must find for the plaintiff; and the burden of proof is on the defendants to show that said after acquired property was purchased and used for necessary or legitimate railroad purposes in connection with the said road.

"B. That it makes no difference to what use the defendants do or have put said property, described in the complaint, if the said wharves are not adjacent to or connected with the said railroad and was not purchased to be used, and was not in fact used, for legitimate railroad purposes by the railroad company itself in the operation and management of the railroad, they must find for the plaintiff.

"C. If the jury believe that the wharves in controversy were purchased from Charles Morgan by the railroad com-

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pany for the purpose of buying off his opposition line of steamboats between Mobile and New Orleans, and that the said property is not adjacent to or connected with the other property of the railroad of said company, and was not used or necessary for railroad purposes or in connection with the operation of said railroad, they must find for the plaintiff.

"D. That no property was conveyed by the proceedings in the United States Circuit Court to the defendants, except such as was conveyed in the mortgage, and no property is conveyed in the mortgage to defendants except such as was acquired and used for railroad purposes by the said company."

The charge of the court, the refusal to charge as requested, and the giving of the charges requested by the plaintiff, are now assigned as error.

GEORGE N. STEWART, and JOHN A. CAMPBELL, for appellants.—This was a statutory real action to recover possession, and in such action only a plaintiff who *has had possession* can recover, against one who entered and unlawfully withholds. The statute is a special provision, unknown to the common law, and applies only to special cases of trespass. The plaintiff elected to pursue this remedy when ejectment was open to him, and he must prove his case, as he laid it.—*Glover v. Bush*, 47 Ala. 173. He never had possession. Defendants never entered unlawfully. The court, in its charge, ignored the distinctive features of this action, and treated it as ejectment.

II. The charter authorizes the railroad company to maintain, manage, use and enjoy any railroad property, steamboats, *wharves*, and appurtenances that the directory may deem necessary, profitable and convenient for the corporation to own, use and manage in connection with the railroad. Express power to purchase was thus given, and having the power to own and purchase, the railroad company had the right to mortgage. For what purpose the property was purchased, or how it was used, was an immaterial inquiry in this suit. The plaintiff is neither the sovereign, to institute an inquiry whether the corporation has purchased property not authorized to be held by it, nor is he a stockholder, complaining of a misapplication of corporate funds in an unauthorized purchase.—*Whitman v. Mining Co.* 3 Nevada, 386; 17 Wisconsin, 372; 22 New York, 258; *Smith v. Sheely*, 12 Wallace, 358; 12 Mass. 102; *Spear v. Crawford*, 14 Wendell, 20. The *validity* of the conveyance is conceded when both parties claim through it.

III. The language of the conveyances is certainly broad

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enough to cover this property. The instrument evinces a purpose to convey every thing. Its language is broader than that in many conveyances, held to pass all after acquired property. In *King v. Marshall*, 33 Beavan, 563, the descriptive words were, "all the lands, tenements and estate of the company." In *re Marine Insurance Co.* Law Rep. 4 Eq. Cases, the words were: "Our undertaking and property, receipts and revenues." In *Wilson v. Boyce*, 2 Otto, 320, the words of the act of the Legislature of Missouri, were "That the bonds should constitute a first lien and mortgage on the road and property of the company." The Supreme Court, commenting on the statute, say: "The generality of its language forms no objection to the validity of the mortgage. A deed of all my estate is sufficient. So a deed of all my lands, wherever situated, is good to pass title. A mortgage of all my property, like the one we are considering, is sufficient to transfer title."—4 Co. 427; 10 Paige, 140; 1 Atk. on Cor. 2. The same doctrine is stated in 2 Lomax Dig. 212. See, also, *Dillon v. Barnard*, 21 Wallace, 430; *Pierce v. Emory*, 32 N. H. 484; *Galveston v. Cowdrey*, 11 Wallace, 459.

IV. If Morgan, by running a line of steamboats in opposition, rendered the business of the road not only unprofitable, but ruinous, it certainly became necessary, convenient and profitable to purchase that line or its appurtenances. The motives of the purchase were immaterial, if the company had the right to acquire this property. It was not bound to put cars on it, all at once—it may not have done so, because of inability to carry out plans for increasing depot facilities entertained at the time of the purchase, or, its directory may have changed their views. The proof does not justify a finding that the purchase was made merely to buy off Morgan's line. Even if it were the case that the sole motive for acquiring the wharves from Morgan was to avoid competition, that would not make the purchase void.—46 New Hamp. 284; *Capper v. Earl of Lindsay*, 3 House of Lords Cases, 293; 14 Eng. L. and Eq. 9; 18 L. and Eq. 87; 15 Jur. 979; 20 Law J., N. S. (Chan.) 248; 1 Eng. R. w. Cases, 462, 58; 9 Sim. 264.

GAYLORD B. CLARK and FRANK B. CLARK, Jr., for appellees.—The law, as well as the written agreement, should confine the controversy to a comparison of the respective titles to the property in question, which the parties had acquired from the New Orleans, Mobile & Texas Railroad Company as a common source.

The defendants (appellants) claim, that the trust deed of January, 1869, conveyed to them in express terms, all prop-

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erty, real and personal, which was then owned or which might thereafter be acquired by the Railroad Company, within and between the limits of the cities of New Orleans and Mobile; that the property being within the limits of the city of Mobile, is embraced in, and passes to them by the terms of the deed; and that the judgments, and sheriff's deeds to plaintiffs, being subsequent to the making and recording of the mortgage, are subject thereto. To this we reply for the appellees, that the property is not within the express terms of the mortgage. The thing conveyed is a railroad, constructed and to be constructed; described as lying between the cities of New Orleans and Mobile, and within the limits of said cities, on the route or line of said railroad—the entire thing which the company was authorized to own and possess for the exercise of its franchises. But the grantors, not satisfied with such general description, proceed to a particular enumeration of what constitutes the railroad and its appurtenances. The descriptive portion of the deed is not broad enough to embrace in its terms after acquired property not purchased nor occupied for railroad purposes; property not contiguous, adjacent or appurtenant to the railroad itself, and not essential to the convenient enjoyment of the company's franchises. The dollar bonds, a copy of which is set out in the deed, show how the deed was construed at the time by the parties themselves. The property is there described as follows, viz: "All that portion of the railroad of said company lying (within the States of Louisiana, Mississippi and Alabama) between the city of New Orleans and the city of Mobile, and within the limits of said cities, together with all the real and personal property, equipments and appurtenances of said company, acquired or to be acquired upon or adjacent to said section of said railroad, as in said deed of trust is fully described." Even if the general terms of the deed are broad enough, they must be construed in connection with the particular words, and be referred to property of like character and description.—Sedgwick, Stat. and Const. Law, 423; Potter's Dwaris on Stat. and Const. L. p. 272, N. 3. A sweeping clause is often put in "to guard against accidental omission, but in such cases it is meant to refer to estates or things of the same nature and description with those already mentioned."—Broom's Maxims, 275, 276.

The property particularly *enumerated* is only such as appertains to the construction and operation of the railroad, and the evident object of the conveyance was to borrow money for the completion of an uncompleted railroad, so as to enjoy the franchises granted by the charter, and to give as a security such after completed railroad and its franchises.

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II. The property sued for, did not pass under the mortgage, because not in contemplation of the parties at the time of its execution. The intention must be drawn from the deed itself, and the circumstances of its execution, and the legal duty and capacity of the contracting parties.—*Pollard et als. v. Maddox*, 28 Ala. 321. See, also, *U. States v. Union Pacific Railroad*, 1 Otto R. 72. The intention of the parties to a deed thus made manifest, must prevail; and general language will not be allowed to defeat such intention.—*Potter's Dwaris* on Stat. & Const. Law, pp. 175, 176; *Broom's Maxims*, 276.

The law considers that every corporation chartered with limited powers, will act within the scope of such powers—will do its duty, and will not disregard the restrictions which, on grounds of public policy, are placed on its operations by the terms of its charter.

The legal presumption, then, is that at the time the railroad company made its deed of trust to the defendants, its intention was to do only that which it was lawfully authorized to do in furtherance of its legitimate objects; and the after acquired property which it then intended to convey, was only such as it had a legal right to acquire.

In holding that the parties to the deed contracted in contemplation of the powers of the company to acquire property, we must determine, by reference to its charter, what those powers were; and we submit that the intention of the legislature, as determined by a proper construction of the entire act, is to limit the power of the corporation in the acquisition of property, to such only as should be obtained for, and which was necessary and convenient for the railroad and its operation.—*Vermont Central R. R. Co. v. Burlington*, 28 Vt. 484.

It will not do to segregate certain general words from the context, and hold that the company possesses all the powers which the isolated expression, without regard to the general intent and purpose of the act, might import. Such an operation would often lead to absurd conclusions.

Take, as an illustration, section 19 of the charter, which contains language broader and more general than is found in any other portion. By this section, "if any person wilfully do, or cause to be done, any act or acts whatever, whereby any building, construction, or work of said corporation, or any engine, machine, &c., shall be stopped, obstructed, injured or destroyed, the person so offending shall pay" double damages to the corporation, and may be indicted and punished by imprisonment. Could it be reasonably contended, that if the company should purchase a saw mill

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in any part of the city, and should operate said mill and peddle lumber therefrom, as an ordinary dealer, and a person should obstruct, injure or destroy the wagons or mill, that such offender could be punished under this act? Yet, failing to observe that the object and purpose of the act, was to protect the public from the inconvenience and danger arising from an injury to the railroad itself, and not to make the property of the corporation any more sacred in the eyes of the law than that of others—the claim of appellants goes to the extent of sustaining such punishments, and because the letter of the law is in terms broad enough to cover the case. *Qui hæret in litera, hæret in cortice.*

The burden of proof was on defendants to show that the property was acquired for the use of the railroad, that it was necessary and convenient therefor, and was, in fact, so used. *Shamokin Val. R. R. Co. v. Livermore*, 47 Pa. St. 465; *Plymouth R. R. v. Caldwell*, 39 Pa. St. 337. Disability to mortgage after acquired property, is the rule; ability, the exception; “and he who alleges the exception must prove it.” *Palmer v. Wright*, Supreme Court of Indiana, Feb. term, 1877; cited in 4 Cent. Law Jour. 548. But defendants have shown that the only purpose of the purchase, was to buy off a competing line of steamboats. It could not have been in the contemplation of the parties to the mortgage made in 1869, that after the completion of the road, the company would buy off competition, and that the property which might be accidentally secured thereby would be covered by the mortgage.

Nothing the first or second mortgage trustees did, or purpose doing to the property, can affect the legal rights of the parties. It was the company which held the charter and the powers thereunder to acquire lands; and the title of the plaintiff to the property is affected only by the status of the company in its relations thereto. A delivery of the property by the company to the trustees, would make no difference. *Parish v. Wheeler*, 22 N. Y. 494. In *Myer v. Johnston*, 53 Ala. 237, this court said, “A corporation, being a creation of legislative enactment, has only such powers and capacities as it is endowed with by its charter. Persons who deal with it, are presumed and required to know, what its powers and capacities are; and they contract with it in reference to the extent thereof, and with the understanding that the language of their contract is to be limited and construed accordingly.”

III. The trust deed is not valid either in law or in equity to convey the property in controversy.

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At common law, a party could not sell nor convey that which he did not, at the time, own or control.—*Otis v. Sill*, 8 Barb. 102; *Seymour v. Canand and N. F. R. R. Co.* 25 Barb. 284, and cases cited by Church, of counsel. *Ib.* p. 295. See, also, *Coe v. C., P. & I. R. R.* 10 Ohio, St. R. 372; *Pierce v. Emory*, 32 N. H. R. 484; *Morrill v. Noyes*, 56 Maine R. 456, and numerous authorities cited by counsel and courts in above cases. The deed of trust was not a valid conveyance of the wharves, at common law; and there is no general statute abrogating the common law rule in this State. The defendants, to sustain their title, must find an express authority in the charter of the company, enabling it to make the mortgage in question, and to give it, when made, the effect that is claimed. It may be argued, "that the purpose in borrowing the money was to construct the road; that the money had to be borrowed before the road could be constructed; and that there was necessarily implied a power to mortgage the railroad before it was constructed; and, as the franchise to use the road passed with it, that all property necessary and convenient for the exercise of those franchises should pass also, as appurtenant to the railroad." But, the implication, must go no further than the necessity requires. Money was to be borrowed and property purchased "for the purpose of constructing and maintaining the railroads." And the mortgage on the railroads so constructed or to be constructed, and the property so purchased or to be purchased, with the franchise to enjoy the same, alone was authorized to secure the payment of such loan. *Cessant ratione legis, cessat ipsa lex.*—*Winslow, trustee, v. Woodward*, 18 B. Monroe, 4431 (on pp. 445-6; *Dinsmore v. R. & M. S. R. Co.*, 12 Wis. R. 649; *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337. A statutory power to convey after acquired property of any kind, is in derogation of a well established common law principle, and is an exception to a well recognized rule of law, and hence is to be strictly construed as against the grantees of the power and those claiming by virtue of an exercise of such power.—*Pennsylvania Railroad Company v. Canal Commissioners*, 21 Pa. St. 22.

The description in the mortgage of the land acquired and to be acquired, must be deemed to refer to the charter, and the law defines the land which the mortgage is designed to cover," and "that the rights of the mortgagees as against the judgment creditor, only extend to the particular lands designated by statute, and which the company was authorized to and did take for the use of the road.—*Seymour v. The Canandagua, &c. Railroad Company*, 25 Barb. 284; *Tuber v. The Cincinnati Railway*, 15 Ind. 459; *Parish v. Wheeler*, 22

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N. Y. 498; *Walsh v. Barton*, 24 Ohio St. R. 28. And an execution creditor can levy on property of the company not so acquired. The company, although it may have acted *ultra vires* in the purchase, is, as well as those claiming under it, estopped from setting up the infirmity of its title.—22 N. Y. R. and 24 Ohio St. R. *supra*.

If the company had not the *right* and *power* to take this property *in invitum* for the purpose and in the manner of its acquirement, it could not have been conveyed in the mortgage; for the property which has only a potential existence, or which may be in expectancy or contingent, can not be mortgaged or assigned, unless the existence or expectancy be based on a *right in esse*.—19 Ala. R. 162; 35 Ala. 570; 42 Ala. 255; 11 Ala. 977; 2 Kent's Com. 144. The trust deed would not, even in a court of equity, give to defendants any title, or right in the property sued for. A lien in equity must have a specific reference to some designated property, either *in esse* or expectancy—property particularly pointed out or described.—25 Barb. *supra*; *Ludlow v. Hurd*, 1 Disney, 552; 1 Redf. on R'ways (4th ed.) 489, note. The defendants can not rely on the mortgage to Gardner and Butler, which is a second mortgage, and not connected with their title. At the time of the levy by the sheriff, the property was in the hands of the company's agent, Jacques. Even if the wharves had been surrendered to the trustees of the second mortgage, of which there is no evidence, and their possession had been confirmed by the United States Circuit Court at New Orleans—before the sale by the sheriff—the sale could not be avoided, as was suggested, by the doctrine laid down in the case of *Wiswall v. Sampson*, 14 How. 52. This property could not be brought under that rule. The United States Court of Louisiana could not have actual possession, by its receivers, of property situated in Alabama.—Revised Statutes United States, §§ 737-742, inclusive. No court can extend its arms so as to hold *in gremio legis* property situated without and beyond the confines of its territorial jurisdiction. "The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district."—*Toland v. Sprague*, 12 Peters' R. 300. See, also, *Boyce's Executors v. Grundy*, 9 Peters' R. 275. "A receiver's right to the possession of the debtor's property, is limited to the jurisdiction of his appointment."—*Booth v. Clark*, 17 Howard, 322 (on p. 334); High on Receivers, § 47. Courts have sometimes sought to bring property in foreign jurisdictions under

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the control of their receivers.—*Shaw v. Shore*, 5 L. I., N. S., ch. 79. But this power is not based on any jurisdiction over the thing itself, or any right to affect the property directly. It can only be enforced by an injunction on the parties within jurisdiction of the court, and rests entirely on the coercion of the person. It affects only such rights and interests as are represented in the cause or can be brought into the forum by proceedings in *personam*.—*Booth v. Clark*, *supra*; *High on Receivers*, § 170; *Ib.* § 471; *Brigham v. Luddington*, 12 Blatch C. C. 237.

BOYLES & OVERALL, same side.—The railroad company had no power under its charter to acquire the property in question. The power and authority conferred by the charter must be construed in connection with the mortgage, and when this is done, it will be seen that the railroad company had no authority to acquire any lands not to be used in connection with the business of operating said railroad.—4 Ala. 558; 36 Ala. 317.

2. Although the railroad company had no power under its charter to acquire lands, except such as were to be used in operating the railroad, yet Morgan sold and conveyed the lands to the railroad company and received the purchase-money and put the railroad company in possession of the lands, and he and all other persons who claim under or through his deed are estopped from denying title in the railroad company.—19 Miss. R. (11 S. & M.) 327; 1 Jones (N. C.) L. 547; *Smith v. Kelly*, 12 Wal. R. 331; 19 Ala. R. 193; 27 Ala. R. 582; 3 Head. (Tenn.) 8; 2 Humph. (N. C.) 251; 4 Wash. C. C. 609; 7 Cal. 419; 1 Mass. 219; 2 A. K. Marsh (Ky.) 454; 17 Geo. 301; 19 Ind. 331; 31 Ill. 501. The railroad company is estopped from denying title in itself.—13 Pick. 116; 3 Litt. Ky. 334; 9 Cush. 540; 58 Ill. 78; 38 Ala. 395; 19 Ala. 436; 17 Ind. 211; 11 Ohio, 475; 4 Peters, 401; 6 Peters, 598; Shep. Touch. 53; 32 N. Y. 295.

A party cannot go behind an estoppel and set up a claim upon which it operates.—18 Ala. 514; 1 John C. R. 166; 1 Sandf. C. R. 244; 1 Mart. & Yerg. 333; 12 Allen (Mass.) 141; 6 Ohio, 87; 4 McCord, (S. C.) 246.

3. The mortgage only covered such lands as the company owned at the time it was made, and lands after acquired for railroad purposes.—25 Barb. R. 311; 3 Zab. (N. J.) 511; 12 Wis. 649; 47 Penn. S. 465; 50 Mo. 30; 22 N. Y. 494; 2 Redfield on Railways, 484, 489 and 493; 11 Wis. 207; 32 N. H. 484; 3 Green Ch. 377; 53 Mo. 308; 18 Vt. 484.

4. No rights at law to after acquired property could be had by the trustees until they took possession.—25 Barb.

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supra; 18 B. Monroe R. 431; 14 Gray (Mass.) 566; 49 Ind. 441; 15 Ohio St. R. 523; 1 Otto R. 603; 12 Wal. 365. The trustees were not entitled to the earnings of the railroad prior to their possession—and property purchased with such earnings is liable to creditors.

STONE, J.—The argument is suggested that by the purchase of the property in controversy, The New Orleans, Mobile & Chattanooga Railroad Company did an act *ultra vires*, and that, therefore, the railroad corporation did not acquire any title which it could convey or pledge by mortgage deed. The title of plaintiff below—appellee here—rests on these foundations: First, a legal title to the premises in the defendant corporation; second, a judgment and execution lien against such corporation; and, third, a levy upon, and sale and conveyance of the title of the lands to the plaintiff below. A purchaser at sheriff's sale acquires only such title as the defendant in execution had; and if his ownership be not a legal title, the holder of such deed can not maintain ejectment.—See *You v. Flinn*, 34 Ala. 409, 415, and authorities. Both parties, plaintiff and defendant, in the court below, trace their title to a common origin, the New Orleans, Mobile & Chattanooga Railroad Company. Donovan, the plaintiff, was required to show a legal title in the corporation to maintain his suit; while the defendant could stand still and rely on the weakness of his adversary's title. We think the doctrine of estoppel can not be invoked in this case to benefit appellee. His purchase at sheriff's sale is an affirmation that the railroad corporation held a title—a legal title. His success in this suit depends on that. He can not be heard, in one and the same suit, to assert that other and incompatible proposition, that the corporation owned no property or interest in the lots which it could convey. The railroad company either had title, or it had not. We think both parties are estopped from disputing the common source of their titles.—*Gantt v. Cowan*, 27 Ala. 582.

If the contract by which the railroad company acquired the lots had remained executory, and there had been a suit to enforce such contract, or to recover for its breach, then the question of *ultra vires* would have been material; and if successfully asserted would have defeated a recovery, whether the suit was brought by or against the corporation.—*Grand Lodge v. Waddill*, 36 Ala. 313; *Waddill v. Ala. & Tenn. R. R.* 35 Ala. 323; Dil. Munic. Corp. § 381, and note 2, 749; Abb. Corp. 258, §§ 414, 415; 870-1, §§ 3, 4, 12; Cooley Cons. Lim. 196.

And in some other forms of proceeding, such, for instance,

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as a proceeding to vacate the charter for misuser, or to set aside the contract as without the pale of the corporate authority, by one or more persons interested in the corporation, the question we are considering would be pertinent and important.—Abb. Corp. 413, § 1, *et seq*; *Whitman G. & S. Mining Co. v. Baker*, 3 Nev. 386.

It is neither a ground of recovery or defense in this action.—Abb. Corp. 258, §§ 416, 423; *Ib.* 870-1, §§ 9, 10, 11; *Whitehead v. Vineyard*, 50 Mo. 30; 3 Nev. 386, *supra*; *Waldo v. Chicago St. P. R. R. Co.* 14 Wisconsin, 575; *Farmers & M. Bank v. Railroad Co.* 17 Wis. 372.

We think the sole question necessary to be considered in this case is, whether the mortgages embrace and convey the lots and wharves in controversy. If the terms of the granting clauses are broad enough and specific enough to include them, then we think there is no question that the title to the defendants is paramount to that of plaintiff. On the other hand, if the mortgages do not convey them, then the plaintiff has the superior title. We quote from the act of incorporation only as aid in enabling us to determine the true meaning and scope of the mortgage conveyances.

The act which incorporated the New Orleans, Mobile & Chattanooga Railroad Company (now New Orleans, Mobile & Texas Railroad Company), approved Nov. 24, 1866—Pamph. Acts, 6—contains the following grants of power; and, it is believed, none other that bear on any question presented by this record:

By section 1, the corporation is "authorized to have and to hold real and personal property for the object, purpose, and business of said corporation within this State, or within any other State, sovereignty or government that may sanction, authorize, and permit the same."

By section 3, "to own and possess any real and personal estate that may be granted, devised or given to it, by or from any person or persons, corporation or association, and to obtain by purchase, and to own and possess any real and personal estate that may be necessary and convenient for the construction, maintenance, and management of the said railroads, . . . to take and hold for the same and for the purpose of necessary depots, stations, cuttings, turnouts, and for obtaining stone, and gravel, and timber for the construction of said railroads, and lands belonging to the said State of Alabama, and extend along or adjacent to the route or course of said railroads, that may be necessary for the construction, maintenance and security of said railroads; and said corporation is also hereby authorized to lay out their said railroads, or either of them, within the State of

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Alabama, not exceeding two hundred feet wide, upon any lands within said State, and to take and possess the same; and for the purpose of necessary turnouts, depots, cuttings, and embankments, and for obtaining stone, gravel, and timber for the construction and maintenance of said railroads, to take and possess as much more lands as may be necessary for the construction, maintenance, and security of said railroads."

Section 6 contains the following language: "That said corporation, being hereby authorized to purchase, receive, and hold such real estate as may be necessary and convenient in accomplishing the object for which this corporation is organized, it may, by its agents, surveyors, engineers, servants, enter upon all lands and tenements through which it may conclude to make such railroads; and survey, lay out, and construct the same, and may agree and contract for the land, right of way, with the owners of the land through which it extends, to make said roads."

Section 15: "And, in like manner, this corporation may obtain, by purchase or grant, from any person or corporation, and afterwards maintain, manage, use, and enjoy any railroad, railroad property and appurtenances, any steamboats, piers, wharves, and the appurtenances thereunto belonging, that the said directors may deem necessary, profitable and convenient for this corporation to own, use, and manage in connection with its said railroads."

Section 17: "That this corporation is authorized and empowered, from time to time, to borrow money, or to purchase property upon its own credit, for the purpose of constructing and maintaining said railroads, or establishing continuous and connecting line of railroads, as heretofore provided; and, as evidence of the indebtedness of said company for such loans, on the purchase of said property, may issue its corporate bonds and promissory notes, bearing interest at a rate not to exceed eight per cent. per annum, and to secure the payment of said bonds and notes, may mortgage its railroad, its capital stock, its corporate franchises, and any of its real and personal property, or any part or portion of the same."

On the first day of January, 1869, the said railroad corporation executed its first mortgage to trustees to secure the payment of its first mortgage bonds, about four millions of dollars in amount; and therein conveyed "the railroad of the party of the first part, lying between the city of New Orleans, in the State of Louisiana, and the city of Mobile, in the State of Alabama, and within the limits of said cities, as the same is located, surveyed, and constructed, or shall be here-

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after constructed, by the party of the first part in the States of Louisiana and Mississippi, and Alabama, and on the route and line of said railroad, between the cities aforesaid, including the right of way and all other rights, interests and estate of the party of the first part, in and to the lands occupied by said railroad, or hereafter acquired, owned and occupied by said party of the first part, including all depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, or sheds, and all machine-shops, and other shops and buildings now owned and occupied, or hereafter acquired, in connection with the said portion of said railroads, situate or lying upon or within the limits of said cities, or upon or adjacent to the said portion of said railroad and the route or line thereof, together with the superstructure and tracks thereon, and including the iron rails, and all the appurtenances thereof; also, all rolling stock, engines, cars, tenders, tools, machinery, fixtures, fuel, and materials, and all other personal property appertaining to, or used, or hereafter used, by the party of the first part, exclusively, for the constructing, operating, repairing or replacing of said portion or section of its railroad, in and between said cities of New Orleans and Mobile, or any part thereof, now belonging to the said party of the first part, or to be by the said party of the first part hereafter acquired and applied to the use of said portion of said railroad; also, all the franchises, rights and privileges of the party of the first part, corporate or otherwise, to construct, maintain and manage said portion or section of its said railroad, or connected with or relating to the same, or the construction, maintenance, or use thereof, . . . together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part thereof."

On the 8th day of March, 1869, the said corporation made a second mortgage to trustees, to secure the payment of its second mortgage bonds, about four millions additional, and therein conveyed "any and all railroad or railroads of the said party of the first part, lying in the States of Texas, Louisiana, Mississippi, Alabama, Georgia and Tennessee, or any or either of them, constituting parts, portions or sections of its main or branch lines of railroads on the general route prescribed by its charter, or any amendment thereto, or hereafter to be authorized, whether now owned or hereafter

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to be constructed, surveyed, located or acquired, by the said party of the first part, including the right of way and all other rights, interests and estate of the party of the first part, in and to the lands occupied by said railroad or railroads, or hereafter to be acquired for that purpose, and in and to all lands owned and occupied, or hereafter to be acquired, owned and occupied by said party of the first part, for constructing, repairing, operating, or doing the business of its said railroad or railroads, or of any such branch railroad, and used therefor, or any part thereof; and including all depots, station-houses, engine houses, car houses, freight houses, store-houses, wharves, warehouses, wood houses or sheds, and all machine shops, repair shops, business offices, and other shops, offices and buildings, now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad or railroads, or branches, or any part thereof, together with the superstructure or track now thereon, or hereafter to be placed thereon, and including the iron, rails, and all the appurtenances thereof; also, all rolling stock, engines, cars, tenders, tools, machinery, steamboats, tugboats, and other boats and vessels, and their engines, boilers, machinery, tackle, apparel and furniture, fixtures, fuel and materials, and all other personal property appertaining to or used, or hereafter to be used, by the party of the first part, exclusively for the constructing, operating, repairing, replacing, or conducting the business of its said railroad or railroads, or branches, above mentioned, or any part thereof, now belonging to the said party of the first part, or to be by the said party of the first part hereafter acquired and applied to the use of said main or branch lines of its said railroad or railroads, or any part thereof; also, all the franchises, rights and privileges of the said party of the first part, corporate or otherwise, to construct, maintain and manage said railroad or railroads and branches, and every part thereof, or connected with or relating to the same, or the construction, maintenance and use thereof, or any part thereof, whether derived from the State of Alabama under its said act of incorporation, or from grants from other States, or from the United States of America, or from any counties, cities, towns, or corporations, or from any person or persons whatsoever or whomsoever; and also the right and privilege to receive the tolls, rents and incomes to be had therefrom, and the exercise of the same upon all parts thereof, and in all States, counties, cities, towns, and all places within or through which the same, or any part thereof, is now or shall hereafter be constructed and operated, together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in

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any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part thereof."

The term railroad, in its broadest sense, has been sometimes ruled to be very comprehensive, and to include within it the franchise, easement or right of way, road-bed, superstructure, depot buildings, turn-outs, rolling stock, shops, tools, materials, and all other property, real and personal, owned and used in connection with the road, or its operation. *Pierce v. Emery*, 32 N. H. 484. The grants of power to acquire real estate, found in the act incorporating the New Orleans, Mobile & Chattanooga Railroad Company, are attended and qualified by the expressions, "that may be *necessary, convenient, for the construction, maintenance, management, security of the railroad.*" The clause most relied on by appellants—that which gives authority to acquire steamboats, piers, wharves, &c.—limits the power of the directors in the matter of their purchase, to such as they may "deem necessary, profitable and convenient for this corporation to own, use and manage in connection with its said railroads." So, in the mortgages, qualifying clauses abound; such as, "the lands occupied by said railroad, or hereafter acquired, owned and occupied by said party of the first part, including all depots, &c., now owned and occupied, or hereafter acquired, in connection with the said portion of said railroads, situate or lying upon or within the limits of said cities, or upon or adjacent to the said portion of said railroad and the route or line thereof."

The clause in the second mortgage most relied on is as follows: "Including all depots, station houses, engine houses, car houses, freight houses, store houses, wharves, warehouses, wood houses or sheds, and all machine shops, repair shops, business offices, and other shops, offices and buildings, now owned and occupied, or hereafter to be acquired and used in connection with its said railroad or railroads, or branches, or any part thereof, together with . . . steamboats, tug-boats, and other boats and vessels, and their engines, boilers, machinery, tackle, apparel and furniture, fixtures, fuel and materials, and all other personal property appertaining to, or used, or hereafter to be used by the party of the first part, exclusively for the constructing, operating, repairing, replacing, or conducting the business of its said railroad, or railroads or branches above mentioned, or any part thereof."

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It will thus be seen, that not only all the grants of power to acquire property found in the charter, but all the words of conveyance employed in the mortgages, speak of property to be owned, occupied and used in the construction and operation of the road, or in connection therewith. Property, real or personal, not wanted or used for one of these purposes, or in connection with one of these purposes, has no clause in either of the mortgages to cover it.

In the *State v. Commissioners of Mansfield*, 3 Zab. 510, the question was, whether a legislative commutation, or exemption from taxes, accorded to a railroad company, exempted from levy and assessment of taxes, certain houses owned by the railroad company, "situate near the line of their road, and used exclusively by workmen and mechanics in the employ of the company." The charter of the company declared "that no other tax or impost shall be levied or assessed upon the said company." The court ruled that the houses did not fall within the exemption, and employed the following language: "Power to construct a railroad, and establish transportation lines upon it, necessarily includes the essential appendages required to complete and maintain such a work and carry on such a business; as the power to erect and maintain suitable depots, car houses, water tanks, shops for repairing engines, &c., houses for switch and bridge tenders, coal or wood yards for fuel for the use of their locomotives, &c., and these are within the fair construction of the exemption clause, because they are necessary and indispensable to the operations of the company, and the accomplishment of the objects of their charter. But there must be a limit somewhere to this incidental power of the company to enlarge its operations and extend its property, without taxation, under this exempting clause, and that limitation, I think, must be fixed *where the necessity ends, and the mere convenience begins*. The necessary appendages of a railroad and transportation company are one thing, and those appendages which may be convenient means of increasing the advantages and profits of the company are another thing."

In *Walsh v. Barton*, 24 Ohio State, 28, the question, as in this case, was between an execution purchaser and a prior mortgagee. The court said: "The testimony shows that the railroad was not located on the lands embraced in the purchase of the defendant below, nor were the lots purchased by him ever used or appropriated for railroad purposes. The question then, is this: Was the entire tract of land embraced in the mortgage? We think not. The words "used or appropriated for the operating or maintaining the said road," restrict the operation of the granting words, con-

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tained in the mortgages, to such property, personal or real, of the company, as then was, or thereafter might be, used or appropriated for operating or maintaining the road. Any property which the company then owned, or afterward acquired, which has in fact been used or appropriated for operating and maintaining the road, and none other, is subject to these mortgages." In *Parrish v. Wheeler*, 22 N. Y. 494, a railroad corporation had given a mortgage on its real estate, railroad, bridges, ferries, &c., locomotives, engines, cars, tenders, shops, tools and machinery, and "all other personal property whatsoever, in any way belonging or appertaining to the said railroad of the said company." Canal boats were purchased and paid for with the funds of the corporation, and used and run by it in connection with the railroad, but beyond its termination. It was held the canal boats did not pass by the mortgage.

In *Shamokin Valley Railroad Co. v. Livermore*, 47 Penn. State, 465, a railroad company, holding town lots adjoining their road bed, ostensibly for a train to connect with river navigation, having mortgaged the entire road with its corporate privileges and appurtenances, but without specific mention of the lots, became embarrassed, and the mortgaged property was sold under proceedings thereon by the sheriff; the lots having been again sold under execution against the company, and bought by the plaintiffs therein, in an ejectment therefor by them against the purchasers under the mortgage, the jury were instructed that if the lots were not appurtenant to the road, and essential and indispensably necessary to the enjoyment of its franchises, and as such included in the mortgage, the plaintiffs were entitled to recover; referring the question of appurtenancy and necessity to them as matters of fact. It was held that the instruction was free from error. We think the word "indispensably" before the adjective "necessary," states the rule too strongly; and that it should have been omitted.

In *Dinsmore v. Racine and Mississippi R. R. Co.* 12 Wisconsin, 649, the granting clause of the mortgage was: "The railroad company granted and sold," &c., "all their railroad, with its superstructure, track and all other appurtenances, made or to be made in the State of Wisconsin, . . . and all the right and title of the said parties of the first part, to the land on which the said railroad is and may be constructed, together with all rights of way now acquired and obtained, or hereafter to be acquired or obtained by the said parties of the first part, and including the depots, engine-houses, shops and other constructions at the city of Racine aforesaid, and at said town of Beloit, and all other places

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along the line of said railroad, and the lots, pieces or parcels of land on which the same are or may be erected, and all the pieces of land which shall be used for depot and station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences and structuary thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of the said parties of the first part, of, in, to, or concerning the same, . . . to have and to hold the said premises and every part thereof, with the appurtenances, unto the said parties of the second part." The railroad company had purchased a tract of land, detached from the track of the railroad, "for the purpose of getting wood and timber therefrom, to be used on said railroad." The question was, whether these lands passed by the mortgage? It was ruled that they did not. To the same effect are *Seymour v. C. & N. F. R. R. Co.* 25 Barb. 284; *Vt. Cen. R. Co. v. Burlington*, 28 Vt. 193; *Galveston Railroad Co. v. Coudrey*, 11 Wall. 459. And we do not consider the following authorities, rightly understood, as warring in the least with these views.—*Harris v. Elliott*, 10 Pet. 25; *Wilson v. Boyce*, 2 Otto, 320; *Dillon v. Barnard*, 21 Wall. 430; *Whitehead v. Vineyard*, 50 Mo. 30; *State v. Nor. Cen. Railway Co.* 18 Md. 173. In *Pierce v. Emery*, 32 N. H. 485, it was held that the mortgage conveyed everything the corporation possessed; and, even with that predicate, it would not be safe to adopt the reasoning of the opinion, as a guide in other cases. See, also, *Meyer v. Johnston*, 53 Ala. 237.

It results from what we have said above that the mortgages conveyed only such property, real and personal, as was useful and necessary, and employed in the construction, maintenance, operation, preservation, repair, or security of the road; and that property owned or acquired, and not used, or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, was not thereby conveyed. Buying off an opposition line of steamers, with a view, not of employing, but of withdrawing them from the field of competition, with all attendant stipulations and incidents, falls without the pale of powers conferred by the act of incorporation, and is not covered by any provision in the granting clauses of the mortgages.

The several rulings of the Circuit Court, excepted to, are in accordance with the views above expressed, and the judgment of the Circuit Court is affirmed.

[Stewart et al. v. Ross.]

Stewart et al. v. Ross.*Ejectment.*

1. *Error; without injury, what is.*—Where a cause is continued, as the judgment entry recites, “until the next term, with the express understanding that it is to be tried then, or dismissed from the docket,” it may be dismissal, on motion, at the second ensuing term, notwithstanding a continuance at the intermediate term; and if a judgment of non-suit is entered, instead of dismissed, this is error without injury.

APPEAL from Circuit Court of Mobile.

The record fails to state the name of the presiding judge.

GEORGE N. STEWART, for appellant.

E. S. DARGAN, *contra*.

MANNING, J.—This cause was begun in 1856, and was continued from term to term—sometimes by consent of parties by their attorneys, sometimes generally, and sometimes on condition if not tried at the next term it should be dismissed. An order of the latter kind was made at the Spring term of the Circuit Court, 1869, which was not enforced.

A similar order was again made at the fall term, 1873, (on the 23d of January, 1874). The cause was, as the entry recites, “continued until the next term of this court, with the express understanding that it is to be tried then, or dismissed from the docket.” This imposed on plaintiffs the duty of proceeding to trial or judgment at the next succeeding term, under the penalty assented to by them, that if they did not, their suit should be dismissed. Although, at the Spring term, 1874, this penalty was not enforced, and the cause was continued generally, the agreement upon record, of Fall term, 1873, was not discharged, but authorized the dismissal of the cause at the subsequent Fall term of the court in the year 1874. About the close of that term (January 12, 1875) the order of non-suit complained of, was entered upon motion of defendant’s attorneys.

The order should have followed the terms of the agreement, and dismissed the cause. But a non-suit when ordered, as in this case, is in effect a dismissal; and we do not perceive that any injury is done to appellants, by the adoption

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of the one form rather than the other. If there was error, it was error without injury.

Let the judgment of the Circuit Court be affirmed.

Little v. The State.

Assault with Intent to Murder.

58	285
102	135

1. *Charge; when not part of the record.*—A charge not set forth or identified by the bill of exceptions, and not marked "given" or "refused," and signed by the judge, is not part of the record, and can not become such by being copied in the transcript.

2. *Same.*—Although the presiding judge does not write "given" or "refused" upon a written charge, and does not sign his name thereto, yet, if the charge is set forth in the bill of exceptions, which shows that it was asked in writing, and that exception was reserved to the ruling of the court, error can be assigned in the appellate court on such ruling.

3. *Character; presumption as to.*—In the absence of all proof as to the character of the prisoner, it is not to be taken as either good or bad; and the jury can not presume that it is either the one or the other, but must base their verdict upon the evidence.

4. *Charge; what properly refused.*—A charge which might lead the jury to believe that irrelevant matter as to the conduct of a third person, not on trial, should influence their verdict as to the prisoner, is properly refused.

APPEAL from Circuit Court of Baldwin.

Tried before Hon. H. T. TOULMIN.

The appellant Little was convicted of an assault with the intent to murder one Daniel Weaver.

The testimony showed that the night previous to the day on which the assault was made, Weaver, and others, "were out after, or looking for, John Little, brother of defendant." The next morning the defendant, riding on a mule, saw Weaver on the road, and coming up within twenty paces of him, remarked, "you little son of a bitch, who in the hell can you arrest?" and at the same time pointed his pistol at Weaver and snapped it. One witness, in answer to a question by defendant's counsel, as to whether he knew the general reputation of defendant for peace and quiet in the community in which he lived, stated that he knew defendant as a rowdy, drinking man, but upon the court's explaining what was meant by "general reputation," &c., answered that he did not know it. The foregoing was the substance of the testimony. The bill of exceptions states, the defendant requested the following written charges: 1st. "The court charges the jury, that if they believe the defendant has proved a good character for peace and quiet in this case, this itself may be sufficient

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to generate a doubt, even though they had no doubt, but for such proof." The court refused to give this charge and the defendant excepted. The defendant also requested the following charge: 2. "The court charges the jury that they are the exclusive judges of the testimony, and unless there is evidence of John Little, brother of defendant, being charged with an offense, they can not consider any such fact, or assumed fact, even though each one of them knew, as a positive fact, that John Little did commit some crime, and that he is now at large; *in other words, the court charges the jury they can not consider any thing as evidence, unless it has been testified to or admitted to the jury.*" The court gave the italicised portion of the charge, and refused to give the remainder of it, and the defendant excepted.

On the first page of the transcript, are copied what purport to be other charges. On some of these, as copied, the word "given" was written, and on others, "refused." These latter charges, however, were not identified in any way, neither was the name of the judge signed thereto, nor were these charges in any way identified or referred to in the bill of exceptions.

The refusal of the latter charges, as well as the refusal to give the charges set out in the bill of exceptions, is now assigned for error.

JOHN H. GLENNON, for appellant.—The court should have given or refused the second charge in the terms in which it was written. It was error to qualify it, or to refuse part and give part.—*Edgar v. The State*, 43 Ala. 45. Where the defendant's character is not proved to be either good or bad, the presumption of law is that it is good, and the charge requested, as to the defendant's good character, was not abstract. It was correct as a legal proposition, and the court erred in refusing it.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The charges copied into the transcript, but not signed by the judge, or referred to in the bill of exceptions, are not part of the record, and can not be considered. As to the other charges, it is sufficient to say that they were abstract.

MANNING, J.—The first of the assignments of error in this cause, relates to what purports to be a charge, number 2, which, though set forth on the first page of this record, is not contained in the bill of exceptions signed by the judge, and is not marked "refused," or "given," according to section 3109 of the Code of 1876. It, therefore, constitutes no part of the case, ought not to have been copied into the record, and affords no basis for an assignment of error.

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We call attention to the fact, that section 3109, above referred to, concerning charges of the court to the jury, asked by either party in writing, makes it the duty of the judge not only to write "given" or "refused," as the case may be, on such written charges, but also to "sign his name thereto." Such a charge "thereby becomes a part of the record." It does not become so unless it be signed by him. Nor can we then reverse for error therein, unless it be duly shown that an exception was taken.

The writings, numbered as charges 4 and 5, to which other assignments of error refer, and which, also, are on the first page of the record—though they have the word "refused" written on them—are not signed by the judge, and they can not, therefore, be accepted as properly before us for consideration. But the bill of exceptions shows that charges to the same effect were requested on behalf of defendant, and refused by the judge, to which refusals the defendant excepted. We shall, therefore, proceed to an examination of them.

By the first of these charges, the judge was asked to instruct the jury, that if defendant had proved a good character as a quiet and peaceable man, that fact may be sufficient to generate a doubt of his guilt, though otherwise they would have had none. This charge would have been abstract. There was no evidence of his good character before the jury. The attempt to prove it failed. And in *Danner v. The State*, 54 Ala. 131, we said: "While it is true that the law presumes every one to be innocent, until the contrary appears by evidence, it does not presume every one to have a good character. . . . In the absence of all proof on the subject, his character is not to be taken as either good or bad, and the jury are not authorized, by assuming that it is one or the other, to let it have any weight in inclining them toward either his acquittal or his conviction. In such a case their verdict should be founded entirely on the evidence legally introduced, and not on any idea unsupported by direct testimony, concerning his general character." The charge requested was, therefore, properly refused.

The other charge asked was also properly refused. Whether John Little, a brother of the defendant, was guilty of a crime for which he ought to have been arrested, or not, was wholly irrelevant to the inquiry whether Joseph Little was guilty or not of the offense for which he was prosecuted. The jury ought not to have been led to suppose, as they might have been, by the charge requested, that John Little's conduct should, in any way, influence their verdict upon the indictment against Joseph Little.

[Ex parte Nettles.]

We find no error in the record, and the judgment of the Circuit Court must be affirmed.

Ex parte Nettles.

Application for Habeas Corpus and Bail.

58	268
94	90
58	268
96	24
58	268
96	75
96	111
58	268
96	29
58	268
100	52
100	119
58	268
130	17

1. *Murder; classification of under our statutes.*—While our statutes have classified murder, they have, in no instance, reduced a common law murder to a lesser offense; and every murder at common law is still murder under our statutes.

2. *Same; what constitutes.*—Where a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, it is not manslaughter, but murder, if he slays his adversary pursuant to a previously formed design, either special or general, to use his weapon in a case of emergency.

3. *Bail; rules governing applications for.*—No general rules can be laid down governing every case where bail is applied for; but it is a safe practice to deny bail, whenever the court would sustain a capital conviction by the jury, if pronounced on the evidence introduced on the application for bail.

4. *Same; decision of primary tribunal denying; weight to be accorded to.*—Where the decision of the primary tribunal, denying bail, is sought to be reviewed, and the correctness of its decision rests on the weighing of evidence, the appellate court can not be unmindful of the superior advantages which the lower court has, by observing the conduct and demeanor of witnesses, in determining the weight which should be attached to the testimony of the different witnesses, and will not interfere, unless it is very clear that the primary court has erred.

5. *Dying declarations; what are not.*—Deceased received a cut two and a half inches in length, between the seventh and eighth ribs, and died six days afterwards. On the evening on which he received the wound he was asked what he thought of his chance of recovery, and on looking towards his attending physician was told that both he and another physician thought the wound a very serious one. The deceased said, however, that he hoped to recover. *Held:* Declaration made at this time, as to the rencountre, in which the wound was received, are not admissible as dying declarations.

6. *Murder; what not competent evidence on trial for.*—The fact that a niece of the deceased made a charge that the prisoner had insulted her, and that this was known to both parties, is competent on the trial of the prisoner for murder; but is not permissible to prove as a fact that such insult was given.

The petitioner, William H. Nettles, being confined in the jail of Dallas county, under an indictment for the murder of one B. F. Powell, applied to the judge of the Circuit Court (Hon. GEORGE H. CRAIG) for *habeas corpus* and bail, which was refused. The testimony on the hearing was taken down in writing; exceptions were reserved to the various rulings of the court, and to the refusal to grant bail on the evidence. And the application is here renewed under section 4850 of the Code of 1876. William M. Nettles, the father of the petitioner, was examined as a witness, and testified that, on

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the day of the homicide, and just before it occurred, he was with his son at his place of business, when his son stated that he wanted to go and see Mr. Frank Powell (the deceased), who was employed at a livery stable about four or five hundred yards distant, and explain to him a difficulty which had just occurred between the petitioner and Tom. Powell, brother of deceased, in reference to alleged dishonorable proposals made by Nettles to their neice, as "Frank Powell was a reasonable man;" that at the time of this remark he had in his hands a small knife, with which he was scraping his finger-nails; that five or ten minutes after this, and after the difficulty, he saw him again, and noticed a small cut on his hand, and a bruise on his ear and the side of his head, which appeared to have been caused by a blow.

The petitioner introduced Dr. J. P. Furniss, who testified that he was a practicing physician, and had been called to see the deceased; that he found on his person an incised penetrating wound of the abdomen, between the seventh and eighth ribs; that the wound was made with a sharp instrument, which must have been at least two and a half inches in length; that after the examination, he told deceased that his wound was a serious one, and repeated to him what Dr. Riggs had said to witness about the wound, to the same effect. Witness stated that he was present when S. W. John, esq., asked Powell what he thought of his chances for recovery, and that Powell then turned an inquiring look to said witness, who then and there told Powell that his wound was a very serious one, and repeated to him what Dr. Riggs had said as to the character of his wound; that John then and there wrote down the answers of deceased to the questions asked him. This witness further testified that the deceased, in answer to a question whether he expected to recover, replied, "I hope to do so." The petitioner then offered in evidence, as the dying declarations of Powell, his answers as written down by John, which the court excluded.

The defendant then introduced one Bussey, who testified that, in two or three minutes after he was cut, Powell laid down, exclaiming "He has killed me; I am a dead man." And in connection with this evidence, again offered to introduce the answers to the questions of John, as the dying declarations of Powell, and they were again excluded. Moore, the proprietor of the stable where the homicide occurred, testified that Nettles came in the back door of the stable shortly before Powell was cut, and asked witness where Powell was. Powell, who was in the mule lot, came in, when Nettles called to him twice; they walked meeting each other, and the first word he understood was Powell's calling Nettles a liar; Powell slapped Net-

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ttles with his left hand open, knocking off his hat ; Nettles then struck Powell and ran out of the front door of the stable. This witness testified that he did not see any weapon in Nettles' hand when he came in, nor during the combat, nor when he ran out ; and that he first noticed that Powell was cut after he came back from the front door, where he followed Nettles when he ran. On cross-examination, this witness testified that he did not hear what was said by the parties previous to Powell's calling Nettles a liar ; that Powell slapped Nettles immediately after the word liar was used, and that Nettles struck Powell immediately on being slapped, and ran off.

One Bussey, a witness for the State, testified that he was in the livery stable when the cutting took place ; that when he first heard words, he was coming out of the mule yard, and that he got up on the fence, which divided the mule yard from the stable, and saw the deceased and some one that he did not know, who were five or six feet apart, cursing each other. This witness testified that he first heard Powell with an oath say, "Go away ; I am busy ;" and that he thought Powell said, "I will see you at another time ;" that the other party cursed Powell, and Powell struck him with his fist ; that the other party went back a step or two, and then came towards Powell and struck at him ; that Powell then said, "Where is my knife, where is my knife," then the man who struck Powell left by the front door of the stable "in a pretty fast trot." On cross-examination, this witness stated that the first thing he noticed was Powell saying in a loud tone, "Damn you," or "God damn you ;" that the next thing he heard was the other party say, "Damn lie," or "Damned rascal," he could not say which ; that Powell struck a pretty severe blow ; that the other man had his side face to witness, and his left hand across his breast as if defending himself, and that he struck Powell with his right hand ; that he saw Powell make another effort to strike about the same time the man struck him.

One Daimwood testified that he was marshal of Selma, and that on the day of the homicide he was called to his office and found Nettles there in the custody of two policemen ; that he did not examine his person ; that he noticed his right ear looked red or purple ; and that he found a knife in the turn-key's desk, where it had been placed by the policemen who arrested Nettles. Witness then produced the knife, which he testified he had kept locked up, and testified that he had examined the knife and found no blood on it. The father of the petitioner was then recalled, and testified that the knife was the one which his son had in his hand when he started to see Powell.

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One Robert, a witness for the defendant, then testified that he was a policeman on the day of the homicide, and that he first saw defendant after he had been arrested ; that his ear was then red, and one of his hands scratched.

One West, also a witness for defendant, testified that he was a policeman, and that in company with one Quartermas he arrested defendant on the day of the homicide ; that they carried him to the marshal's office, where he was searched, and a small knife found on his person. Witness thought the knife produced by Daimwood was the one found on Nettles.

One Quartermas, also a witness for petitioner, testified that he arrested the defendant on the day of the homicide, and took from his pocket a small knife, with a blade about one and a half inches long. This witness could not identify the knife produced by Daimwood as being the one taken from Nettles. He testified that, his attention being called to it, he noticed that one of Nettles' ears looked as if he had been slapped or struck.

The State introduced one Thomas Powell, the brother of the deceased, who testified that he was standing in the door when the difficulty between his brother and Nettles occurred ; that he and Nettles had just been released from arrest for disorderly conduct, and that they both arrived at the stable about the same time ; that he saw his brother come out of the mule shed, and heard Nettles call to him twice ; that his brother replied that he did not have time to attend to Nettles, to which Nettles replied, "You have got to see me ;" to which his brother answered, "Well, if you have got to see me, what is it?" that he could not understand what Nettles then said, but heard his brother say, "Nettles, there is no use for you to parley with me, for you have insulted my neice, and no gentleman would do it ;" to which Nettles replied, "You are a God damned son of a bitch ;" that his brother then slapped Nettles with his left hand open, and Nettles returned the blow ; that both blows were struck almost at the same time, and that no other blows were struck ; that Nettles then ran out of the stable, followed by his brother, to the front door.

One Steward Farr, a witness for the State, testified that he was present when the difficulty occurred ; that when Nettles came in, the first thing he said to Powell was that "He wanted to see him ;" that Powell asked Nettles "What he wanted to see him for ;" to which Nettles replied that "He wanted to see him, that was what he wanted with him ;" Powell said "You are the one that started the fuss a little while ago ;" Nettles replied, "I was not ;" Powell said, "You were," and Nettles said, "Whoever says so, is a damn liar ;"

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Powell started towards him; Nettles turned and met him; Nettles struck Powell, and Powell hit at Nettles, knocking off his hat and catching hold of Nettles; Powell put his hand into his pocket to get his knife; Nettles then struck Powell in the side, jerked loose and ran; Powell followed him to the front door, and then came back into the stable. This witness testified that he saw Nettles when he came in at the back door; that he had a knife in his hand, which he held with the blade up his arm on the outside of his sleeve. This witness, when cross-examined, stated that Powell struck but one lick, and that he (witness) caught hold of Powell by the lapel of his coat with his right hand when he tried to get his hand in his pocket to get his knife.

The State then introduced Estelle Brown, who testified that she was the neice of, and resided with the Powells; that, while coming home from school, Nettles accosted her on the street, walked on her way home with her, and made indecent proposals to her, as to meeting him at night, offering to pay her if she would do so; that she made no reply whatever to these questions, and when she arrived at home informed her uncles of them. This evidence was objected to by the defendant; but his objections were overruled by the court, and he excepted.

THOS. H. WATTS, for petitioner.—Our constitution and laws give to the accused the legal right to bail, unless the proof is evident, or the presumption great, that he is guilty of murder in the first degree; that alone being punished capitally. The common law rule, refusing bail after indictment is found, has been abrogated by our constitution and laws.—See *Ex parte Bryant*, 34 Ala. 270; 19 Ala. 561; 30 Ala. 43; *Ib.* 49; 28 Ala. 89; 53 Ala. 495. The question here presented is, whether the defendant, on the testimony before the Circuit Judge, is shown to be guilty of murder in the first degree. In determining this question, the Court must give the defendant the benefit of all reasonable doubts; and if the court is not convinced, under this rule, that the defendant is guilty of murder in the first degree, he is entitled to bail as a matter of right.—See *Ex parte Bryant*, *supra*, and authorities there cited. In other States having constitutions and laws as to bail like ours, the rule above stated is sanctioned. See 2 Ashm. (Pa.) 230; 27 Ind. 92; 30 Miss. 681; 39 Miss. 721; 36 Miss. 742; 9 Dana, (Ky.) 40; 11 Leigh, 677; 24 Ark. 275; 25 Texas, 33; 41 Texas, 213; 7 La. An. 247.

Under our law, to constitute murder in the first degree there must be a *willful, deliberate, malicious, and premeditated* killing. If it is not *deliberate* and *premeditated* it is not mur-

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der, although it may have been *malicious* and *willful*; and if the offense charged is not murder in the first degree bail must be granted as a matter of right. There is no discretion in the judge about it.—See authorities, *supra*. The facts must show, with *reasonable certainty*, that the defendant is guilty of murder in the first degree, or bail is a matter of right. Where a judge has refused bail, his finding on the facts is not entitled to the same weight as if the finding was on a final trial. The Supreme Court will weigh the evidence without regard to the finding of the judge below.—27 Ind. 87. The facts in this case, to say the least of them, leave it in grave doubt whether *malice* or *premeditation* can be imputed to the defendant, if they do not clearly show a case of self defense; and if any of the necessary ingredients of murder are in doubt, the defendant is entitled to the benefit of the doubt.

Attorney-General SANFORD, and S. W. JOHN, *contra*.—The evidence sought to be introduced as dying declarations, was properly excluded. To admit them as such, they must be made “under the sense of impending dissolution, when every hope of the world is gone, and every motive to falsehood silenced.” Powell himself believed he would recover, and the physician had only told him that he was very seriously hurt.—52 Ala. 192; 47 Ala. 9; 12 Ala. 764; 1 Moody and Robinson, 551.

The evidence of Estelle Brown was properly admitted; it was offered to explain the defendant's conduct at and before the difficulty, and for this purpose was clearly admissible.—49 Ala. 381; 17 Ala. 618; 23 Ala. 44. This evidence was also offered to show motive on the part of the defendant, and any evidence, however slight, tending to show motive, is admissible.—47 Ala. 573; 56 Ala. 573; 17 Ala. 30; 26 Ala. 31; 46 Ala. 703; 17 Ala. 618. This evidence was also admissible to show the state of feeling between the deceased and his slayer.—9 Conn. 47.

The rules governing application for bail to this court, after the lower has refused it, may be condensed into two. First, that it is always a safe practice to refuse bail, in all cases, when a judge would sustain a capital conviction on the evidence exhibited to him; and, second, that, in viewing the action of the judge below it *should be clear* that he has erred in his judgment, or this court should abstain from interference.—53 Ala. 495. Under these rules, and in the light of the evidence, the circuit judge properly refused bail, and this court must be satisfied that in doing so he committed no error.

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STONE, J.—There is very great want of order, method, and completeness in the presentation of the evidence in this record. The distances and relative position of the places mentioned are, as a rule, not so explained as that we can be profited by their consideration. This testimony was, no doubt, understood in the examination before the circuit judge; for the trial was had where the homicide was committed, before a judge who is supposed to be familiar with the localities described. Hence, he had advantages which, in the state of this record, we can not enjoy.

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great."—Declaration of Rights, § 17. See, also, Code of 1876, § 4842. The rules for admitting to bail in capital cases, under constitutions and statutes similar to ours, have been very differently declared in different States. In *Wray, ex parte*, 30 Miss. 673, the majority of the court, pronouncing on the constituents of murder, asserted principles which we emphatically disapprove. We can not too strongly express our condemnation of the popular fallacy, to use no stronger phrase, therein unfortunately countenanced, which we believe is annually rushing scores, if not hundreds of our citizens into eternity, red with their own blood causelessly shed. Until courts and juries learn to place a proper estimate on the sacredness and inestimable value of human life; learn that life is not to be taken to avenge an insult, even though gross; learn that felonious homicide, even willful and deliberate murder, may be committed during a personal, nay, mutual rencontre; until juries learn that the crime of murder is not expunged from our statute book, nor retained only for the friendless or humble, we may expect the carnival of the manslayer to be prolonged, if not intensified. We have been led to these strong expressions by the extraordinary rulings found in the case of *Ex parte Wray, supra*. We are glad to know that one of the justices—Judge HANDY—spoke out in no ambiguous terms in condemnation of the pernicious doctrines of the majority opinion. He asserted the true principles of the law that have come to us sanctified by the wisdom and philanthropy of centuries: the law that takes life regretfully, but with unflinching purpose to protect and preserve human life, by punishing the murderer. "If a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, it is not manslaughter, but murder," if he slay his adversary pursuant to a previously formed design, either special or general, to use his weapon in an emergency. None but a wicked and depraved heart will de-

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liberately determine on the death of an assailant, unless it becomes necessary to do so in defense of his own life, or to avert impending grievous bodily harm, as the law defines that phrase. —See *Judge v. The State*, at the present term. See, also, *Rex v. Thomas*, 7 Car. & Payne, 817; *State v. Craton*, 6 Ireland, 164. And we dissent with equal emphasis from the rule for admitting to bail laid down in *Moore v. The State*, 36 Miss. 137, and reasserted in *Beall v. The State*, 39 Miss. 721.

What we have said above is intended to have a general application, and is prompted by a strong conviction that it is our duty to place on record our unqualified disapprobation of the doctrine declared in *Wray, ex parte*. So far as our observation has extended, that case stands alone in the principles it enunciates. The definition and constituents of murder have come to us from the common law, that grand, colossal system which, in the purity and elevation of its morals, the maintenance of right and repression of crime, the equal protection of all in the enjoyment of life, liberty, and property, challenges the admiration of the world. Our statutes have classified murders, but in no instance have they reduced a common law murder to a lesser offense.—See Code of 1876, § 4295. Every murder at common law is murder under our statutes. If it now requires a higher degree of criminality to secure a conviction of murder than it did at common law, the fault is not in the law; it is in its lax and falsely merciful administration.

The foregoing reflections are intended to have no application to the present case, farther than the principles asserted may bear on the facts found by the jury. The cases, *Rex v. Thomas* and *State v. Craton, supra*, precisely define our views.

In *Com. v. Keeper of Prison*, 2 Ashm. 227, 234, a case of primary trial on application for bail, the court said, "It is difficult to lay down any precise rule for judicial government in such a case; but it would seem a safe one to refuse bail in a case of malicious homicide, where the judge would sustain a capital conviction, pronounced by a jury, on evidence of guilt, such as that exhibited on the application for bail; and to allow bail, where the prosecutor's evidence was of less efficacy." This case was affirmed and acted on in the case of the *State v. Simmons*, 19 Ohio, 141. In *ex parte McAnally*, 53 Ala. 495, this court approved the foregoing as the correct rule in the primary court, and added: "When the question is presented to a revisory court, much is due to the judgment of the primary tribunal. The witnesses are personally before it, and the examination is usually had near the scene of the alleged offense, and in the midst of the circumstances

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attending the transaction. In all investigations of criminal accusations, much depends on the manner in which the witnesses testify, the feeling of partiality or prejudice they may manifest, and their general demeanor. There the primary court has the opportunity of observing, and it should be clear that it has erred in its judgment, or a revisory court should abstain from interference." In two cases since that time—*Ex parte Weaver*, at December term, 1876, and *Ex parte Allen*, September term, 1877—we have followed the rule laid down in *McAnally's* case. In each of the cases last mentioned, the question arose on the weighing of evidence. Under one phase of the testimony, the presumption was great that the defendant was guilty of murder in the first degree. Under the other, Weaver was not guilty of any offense, and Allen could not be guilty of anything higher than manslaughter. The judge below denied bail to each, and we refused to disturb his ruling, on the principles above declared. It is our purpose to adhere to these rules, although we are aware they are somewhat in conflict with other decisions.—*Ex parte Bryant*, 34 Ala. 270; *Ex parte Heffren*, 27 Ind. 92; *McCoy v. State*, 25 Texas, 33; *Ex parte Miller*, 41 Texas, 213.

In the present case the deceased came to his death by an incised wound, inflicted with a knife. The testimony of two witnesses is that the incision extended inwardly from the surface from $2\frac{1}{4}$ to $2\frac{1}{2}$ inches. It was a mortal wound, and that it was inflicted by the defendant does not appear to be controverted. We think a knife, capable of making a wound $2\frac{1}{2}$ inches deep, must be classed as a deadly instrument. The defendant sought the deceased at his place of business, and accosted him there. The tendency of the testimony is that he then held an open knife in his hand. Few words preceded the blows, and the fatal stab was given. An explanation is offered why the defendant had an open knife in his hand. If the defendant really sought the interview for the purpose of an explanation, and with no intention of using the knife, should a difficulty ensue, and the use of the knife was the sudden, unpremeditated result of passion, engendered by the blow, then he was not guilty of murder. On the other hand, if he had or held the knife for the purpose of using it, should a conflict ensue; and if, pursuant to such purpose, he did fatally stab the deceased, at a time when there was no apparent, pending present danger to his own life, or of that class of injury which the law defines as grievous bodily harm, then he was guilty of murder in the first degree. In determining this pivotal issue in the cause, all the attendant facts should be weighed. The state of feelings of each party, in view of the accusation then recently

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made ; the fact that the interview was of the prisoner's own seeking ; the manner of his approach and address to the deceased ; the fact, if it be a fact, that he had an open knife in his hand ; the manner of his holding it, and the explanation of his having the open knife, offered in his defense ; his words, voice and manner when he approached, and when he accosted Powell ; and whether these, and his language and conduct during the altercation, indicated pacific intentions, or the opposite—these, and all other circumstances connected with the affray, it was proper for the circuit judge to scan. Under one construction of the evidence, the offense was not bailable ; under the other, it was. The primary court had much better opportunities of construing these facts and circumstances than we can have, and we will not disturb its ruling.

We do not think the declarations of deceased, sought to be proved as dying declarations, were sufficiently shown to have been made under a sense of impending death, to justify their admission in evidence. It is not shown that the expectation of recovery was entirely destroyed.

Neither do we think it was permissible to prove as a fact the alleged insult to the little girl. That she had made such charge, and that Powell and the defendant each knew she had made it, would have been legal evidence. It sheds light on the conduct of each of the parties.

Writ of *habeas corpus* refused.

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Bill in Equity to recover Rent.

1. *Rent; when passes with reversion.*—Rent is an incident to the reversion, and whoever is entitled to the reversion when the rent falls due, is also entitled to the rent, unless it was reserved from the grant, or has been previously severed; and this, whether the assignment of the reversion is by act of the lessor, or by operation of law.

2. *Same.*—The purchaser, under a decree in chancery of the lessor's lands, is entitled to the rent afterwards falling due, as against the assignee of the tenant's obligation to pay, whose interest was acquired pending suit, although the claim of the assignee would prevail against the lessor; and attornment on the part of the tenant is not necessary to perfect the right of the purchaser.

3. *Same; when bill in equity will not lie for recovery of.*—Where the right to recover rent is legal, and there is an adequate legal remedy, a court of chancery should not, in the absence of some equitable ground, take jurisdiction to decree its recovery.

58	277
108	274
58	277
182	868
58	277
185	217

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4. *Adequacy of legal remedy; when will not defeat relief in equity.*—Where the subject matter of the suit does not lie without the jurisdiction of a court of equity,—as a bill to recover rents—and the parties go on to a hearing and decree on the merits, without raising the objection that the remedy at law is adequate, the objection is waived, and can not be urged on appeal.

5. *Demurrer; what not considered.*—A demurrer for want of equity, is a mere general demurrer, which the statute forbids the court to entertain.

APPEAL from Perry Chancery Court.

Heard before HON. CHARLES TURNER.

The appellee, Sarah J. Martin, who, after the institution of the suit, intermarried with one Fort, filed this bill against Tubb, Jeffries, and certain persons composing the firm of Morey, Watson & Dunlap, to recover certain rents.

The case made by the bill, answers and testimony, may be thus stated: The lands belonged, originally, to appellee's husband, who sold them to Jeffries, giving him bond to convey title on payment of purchase-money, and putting him in possession in the year 1863. Martin brought ejectment against Jeffries, who had not paid for the lands in full, to recover possession; and Jeffries filed his bill in chancery to enjoin the prosecution of the suit, and for an account of the amount due, &c. Pending the suits Martin died, leaving a last will and testament, which was duly proved and admitted to probate, whereby he gave and devised all his realty to his wife, said Sarah J., who was also appointed executrix. The chancery suit was revived against said Sarah J., and such proceedings afterwards had therein, that a decree of sale of the lands was made for the unpaid purchase-money. Pursuant to this order, the register sold the lands at public outcry, on the first Monday in July, 1871, and said Sarah J. became the purchaser, receiving a conveyance from the register, and the sale was confirmed by the court at its succeeding Fall term.

Jeffries, while the chancery suit was pending, and on the 7th day of January, 1871, leased the premises for one year to Tubb, who, in payment of rent and for the use of certain mules furnished by Jeffries, agreed to deliver to Jeffries, in December following, eight bales of cotton. About the first day of March, 1871, Jeffries transferred Tubb's obligation to Morey, Watson & Dunlap, as collateral security for a debt Jeffries owed them.

The day before the filing of the bill (November 1st, 1871), Tubb delivered eight bales of cotton, grown on the premises, to Morey, Watson & Dunlap, they giving him an obligation to indemnify him in making the payment to them; and this cotton was afterwards sold by that firm. The testimony tends to show that neither Tubb nor Morey, Watson & Dunlap, had any actual notice of Mrs. Fort's claim at the time Tubb's

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obligation was transferred to them; but it shows that all of them knew of it before the cotton was delivered.

The bill alleged, that Tubb was insolvent, and Morey, Watson & Dunlap were about to remove the crops, &c., and that if complainant should lose her lien, she could not collect the rent out of Tubb, and that both of them well knew her rights in the premises, but combined and confederated to defeat her just claim for rent, and she prayed a seizure of the crop, to an amount sufficient to pay the yearly rent, which was alleged to be of the value of \$750; that the conflicting claims of the parties be settled; that an account be taken of the amount of rent due from Tubb, and also of the value of the part of the crop received by Morey, Watson & Dunlap, and, if necessary, that they be required to pay the same to complainant, and for general relief.

The defendants demurred to the bill, on the ground that "the bill of complaint contains no equity;" and because of "a misjoinder of parties in making Jeffries a party." This demurrer seems not to have been brought to the attention of the Chancellor, and no ruling was made thereon. A decree *pro confesso* was taken as to Jeffries, and Tubb and Morey, Watson & Dunlap answered, but in neither of the answers was incorporated any demurrer, nor was any mention made of the demurrer filed. The answers denied complainant's right to the rents; insisted on the rightfulness of Tubb's payment to Morey, Watson & Dunlap; denied notice of complainant's rights, and insisted that the rental value of the lands was much less than the amount claimed in the bill; and the testimony taken by the respondents related solely to these matters.

The cause was submitted on bill, answers, decree *pro confesso* and testimony, and the Chancellor decreed that complainant was entitled to a landlord's lien on the crop grown on the premises for the year 1871, superior to the claim of Morey, Watson & Dunlap, and that the latter had removed a part of the crop, with full notice of complainant's lien, and thereupon referred it to the register to ascertain and report what was the rental value of the premises for the year 1871, and the amount of the obligation given by Tubb, including the value of the hire of certain mules and implements, as well as the value of the rent. The register, after the examination of a number of witnesses, whose testimony he returned with his report, reported that the rental value of the premises was \$472.50; and the Chancellor overruled an exception to it, on the ground that it placed the value of the rent too high, confirmed the report, and rendered a final decree against Tubb for that amount and taxed him with costs.

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The decree granting relief, the overruling of the exceptions to the register's report, and the final decree against Tubb, are now assigned as error.

W. B. MODAWELL, for appellant.—Jeffries transferred the note to Morey, Dunlap & Co. before appellee had any right to it, and the latter paid valuable consideration for it. Besides this, appellee had a complete remedy at law, and should have pursued it.—Revised Code, § 2961; 15 Ala. 166; 46 Ala. 304; 12 Ala. 155.

PETTUS, DAWSON & TILLMAN, *contra*.

BRICKELL, C. J.—There can be no proposition more firmly established in the law, than that rent is an incident to the reversion; and that whoever is entitled to the reversion, at the time the rent becomes payable, is of right entitled to it, unless it is reserved from the grant, or has been previously severed.—*Pope v. Harkins*, 16 Ala. 323; *English v. Key*, 39 Ala. 113; *Bunk of Pennsylvania v. Wise*, 3 Watts, 394. It is not material whether the assignment of the reversion is by the act of the lessor, or by operation of law, the rent passes to the assignee. The principle is thus stated in 2 Coke, (Butler & Hargroves,) p. 215, § 348: "Both assignees in deed and assignees in law shall have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion and goeth with the same." Though at one time, it was held, if during the term the lessee obtained the fee of the lessor, under a conveyance silent as to the rent, the rent for the remainder of the term only was extinguished. *Martin v. Bradley*, 3 Stew. 50. The later authorities hold, the transfer of the reversion carries the rent to the assignee, though it is not expressly mentioned, and there can be no apportionment of it between the lessor and the assignee.—*English v. Key*, *supra*.

We regard it, therefore, as undeniable, that the appellee, by the sale and conveyance to her of the lands, under the decree of the court of chancery against the lessor, became entitled to the rent accruing from the tenant, payable at the expiration of the year. She was vested with the reversion, and that carried the rent as an incident, and she could have pursued all the remedies for its recovery the lessor could have pursued, if his estate in the premises had not been terminated. The transfer to Morey, Watson & Dunlap of the agreement or obligation of the tenant for the payment of the rent, before it was due and payable, was doubtless binding on the lessor, and if his estate had remained undetermined

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until the rent was actually payable, would have entitled the assignees to its recovery. But it is invalid and inoperative against the appellee. That assignment was made pending the suit in chancery, which involved the title to the land, and resulted in the decree for its sale, under which the appellee became the purchaser. The suit was notice to the tenant, and to the assignees of his obligation or agreement for the payment of the rent, of the infirmity of the lessor's title to the premises, and of the superiority of the lien asserted by the appellee, and they are bound by the decree as if they had been parties to the suit.—*Chaudron v. Magee*, 8 Ala. 570; *Center v. P. & M. Bank*, 22 Ala. 743; *Bolling v. Coster*, 9 Ala. 921. The appellee, by her purchase at the sale under the decree in that suit, if the lessor had not made the lease, and had remained in possession, would have been entitled to immediate possession. The lease did not prevent the entire estate of the lessor from passing to the appellees. It was consequently out of her lands the rents issued, and she was entitled to them. An alienation of the reversion pending the suit, would have been subject and subordinate to the decree subsequently rendered therein. The pendency of the suit restrained not only the power of the tenant to alienate the reversion, but his power to sever the accruing rent from the lands, so as to defeat or impair the rights of the purchaser under the decree.—*Menough's Appeal*, 5 Watts & Serg. 432. The assignees of the rent, therefore, are affected by the decree, as they would be if they were assignees of the reversion.—*Taylor's Land. & Ten.* §§ 446-47.

Though attornment by the ancient common law, was necessary to create the relation of landlord and tenant, when, pending the term, there was an alienation or assignment of the demised premises, the statute now dispenses with it, and the conveyance itself creates the relation, protecting the tenant only against the payment of rent, he may have paid to his original landlord without notice of it.—*Revised Code*, § 1568.

It is insisted for the appellants, that if the appellee was entitled to the rent, she had an adequate remedy at law for its recovery, and consequently the Chancellor erred in taking jurisdiction of the case, and decreeing her relief. Whatever may have been the doubts at one time entertained, it seems now to be settled, that if the right to recover rent is legal, not equitable, and there is an adequate remedy at law, courts of equity will not take jurisdiction to decree its recovery. If, however, the remedy at law is inadequate or doubtful, or there is a peculiar equity, the court will take jurisdiction.—1 *Story's Eq.* § 684 *b. c.* We do not deem it necessary to in-

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quire whether the bill discloses the inadequacy of the remedy at law, or a peculiar equity, which would justify the interference of the court.

The appellants did not, in the Court of Chancery, in any form, either by demurrer, motion to dismiss, or by answer, object that the remedy of complainant was at law. A demurrer seems to have been interposed at one time, assigning only two causes—that there was no equity in the bill, and that the lessor, Thomas J. Jeffreys, was improperly joined as a defendant. The first is a mere general demurrer, the statute prohibits from being entertained, and the second, if well taken, was not a cause of demurrer for any of the defendants, except Jeffreys, and being taken by all, could not have been allowed. This demurrer was, however, waived by the subsequent answer of the defendants, in which it was not incorporated, nor does it seem ever to have been called to the attention of the Chancellor. The answers litigate the right of the complainant to the rent, and controvert its amount. This was the whole scope of the contention in the Chancery Court. In this court, for the first time, after litigation on the right and extent of recovery has been decided adversely to them, the appellants urge the remedy of the complainant was at law, and not in equity. In answer to the same objection, made to a bill for the recovery of rent, for the first time, at the hearing, Chancellor KENT said: "If the defendant intended to have objected to the jurisdiction of the court, he should have demurred to so much of the bill as prayed relief. It is a general rule, that he comes too late with his objection at the hearing, after he has, by his answer, put himself upon the merits."—*Livingston v. Livingston*, 4 Johns. Ch. 287. The general rule of practice in courts of equity, has long been settled, that if the subject matter of the suit is not without the jurisdiction of a court of equity, and there may be circumstances under which it would be competent for the court to grant relief, the objection that there is an effectual and complete remedy at law, must be taken by demurrer, and comes too late at the hearing.—1 Dan. Ch. Pr. 550, (n. 3). In its very nature, the objection is of that class, which ought to be taken in the earliest stage of the suit, before costs have accumulated, or by the lapse of time irreparable injury may result, by remitting the complainant to a legal remedy, which has in fact become unavailing. Under our rules of practice, the equity of the bill is a subject of dispute, at any time before final decree, on a motion to dismiss, by any defendant, whether he has answered, or is in contempt for want of answer, unless he has demurred for want of equity, and his demurrer has been overruled.—1

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Brick. Dig. 731, §§1342-1349. The case of *Andrews v. McCoy*, 8 Ala. 920, as explained in the subsequent case of *Lockhard v. Lockhard*, 16 Ala. 423, presented the precise question we are considering. The bill stated the cause of action in the alternative, and one of the alternatives, if true, was fatal to a recovery. No objection was made to it in the court of chancery, and the proof showing a right of recovery, this court, in answer to an objection to the sufficiency of the bill, said: "If the bill had been demurred to for this cause, and the objection distinctly presented, it could have been obviated by an amendment. Instead of pursuing this course, the plaintiffs in error submitted to answer the bill, set up their title, and litigate their rights, without objection, and it would be grossly unjust to the complainant, to permit them now, after the cause has been heard on its merits, to raise an objection, which by their previous conduct they had waived in the primary tribunal. Such has been the constant course of decision in this court for some years." In *Lockhard v. Lockhard*, *supra*, the bill was filed by one tenant in common against his co-tenant for an account of rents, disclosing that the complainant and the defendant had agreed the defendant should occupy the premises at a stipulated rent. The defendant answered without objection to the jurisdiction of the court, but on the hearing submitted a motion to dismiss, because the remedy of the complainant was at law, on the agreement for the payment of rent. The motion to dismiss was sustained, and this court held properly. The court carefully distinguishes the case from that of *Andrews v. McCoy*. The distinction is, that under our practice a motion to dismiss may be made on the hearing, though no demurrer has been taken, and in the latter case the motion was made. While in the former it was not, and was consequently regarded as waived. If a defendant may, as it can not be doubted he may, waive the objection, that the subject matter of the suit, though lying, as the recovery of rent does, within the concurrent jurisdiction of a court of equity, is in the particular case without the jurisdiction of that court, because the remedy at law is adequate, he must be deemed to have waived it, when, without objection he answers, enters into active legislation on the merits, lures his adversary into security, withdraws his attention from the necessity of amendment, if an amendment can consistently with the facts be made, multiplies costs, protracts litigation, and on the hearing directs the attention of the court from the consideration of any other question, than whether the complainant has the right he asserts. Of course, we refer to cases in which the subject-matter of the suit lies within the jurisdiction of a court of

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equity, and the objection is, that the remedy at law is adequate, and not to cases in which the subject matter does not fall within the jurisdiction. We can not now sustain the objection made, that the remedy of the appellee at law, was adequate. That objection not having been made in the court below, in any form, if well founded, must be regarded as waived.—*Tyler v. McGuire*, 17 Wall. 253.

There was no error in overruling the exceptions to the report of the register. Upon questions of fact, such as the value of the use and occupation of lands, dependent not only on the evidence taken by deposition, but on the oral evidence of witnesses produced before the register, his conclusions are not disturbed, unless manifestly erroneous.—*Mahone v. Williams*, 39 Ala. 221. We can not say they are plainly wrong, but incline to the opinion they are correct, and we concur with the Chancellor in the opinion that they should not be disturbed.

Let the decree be affirmed.

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Bill in Equity to enforce Vendor's Lien, &c.

1. *Distribution; part husband takes in wife's personalty; parties to bill for distribution.*—Where husband and wife sell lands of her statutory estate, taking notes for the purchase-money, her estate is thereby converted into personalty, and her husband, on her death intestate, takes one-half absolutely; and where the wife's distributees seek to enforce the vendor's lien and a decree for the amount of the notes, they are not entitled to relief—though a case proper for distribution direct, without administration on the wife's estate, be shown—if the bill showing the husband survived the wife, fails to make him a party; and the objection may be raised for the first time in the appellate court.

2. *Same; when distributees can not maintain bill for distribution.*—Where, in such a case, administration was had on the wife's estate, which is declared insolvent, and the administrator settles and resigns, nothing further being done in the administration, the distributees directly can not maintain such a suit; and the fact that they are too poor to cause further administration or take out letters for that purpose, can not dispense with the necessity for administration, and having those interested in the estate properly before the court.

APPEAL from Chancery Court of Dallas.

Heard before Hon. CHARLES TURNER.

The appellees, who are the heirs at law of Mrs. Mary L. Gayle, filed this bill against one Marshall, who had purchased lands of the statutory estate of said Mary, giving his notes for a part of the purchase-money, and against one Shields, surviving partner of a firm, to which, it is alleged, the

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husband, without the wife's consent, transferred the notes in satisfaction of a debt, for which it is alleged she was not bound. The bill prayed a decree in complainant's favor for the amount of the notes, and that a vendor's lien be enforced on the lands for their payment. On hearing on pleading and proof, the chancellor decreed the relief sought, and this decree is assigned as error.

The facts of the case are thus stated by Mr. JUSTICE MANNING :

Mrs. Mary L. Gayle, mother of the appellees, being in possession of a tract of land, as her statutory separate estate, jointly with her husband, Reese D. Gayle, sold and conveyed it, with their warranty of title, to appellant, Marshall, in 1871, for \$7,000. Of this price, the sum of \$4,000 was paid in cash ; and for the rest, two promissory notes for \$1,500 each, and interest, were a few days afterwards executed by Marshall and a surety for him, and made payable at the Southern Bank of Alabama, one and two years afterwards, respectively, to the order of Milhouse & Shields, commission merchants of Mobile. The notes were made payable and delivered to them, in order to discharge other property of a mortgage in their favor, which Mrs. Gayle and her husband had previously executed. The property so mortgaged was of her separate estate, but whether of her statutory or equitable separate estate, does not appear. The first due of the said two notes, was paid by Marshall to Milhouse & Shields, and the other was transferred by them to their successors, Milhouse, Shields & Mooring, and passed from them to their successors, Shields & Mooring, and is still unpaid.

In the meantime, early in 1872, Mrs. Gayle died, leaving her children, the appellees in this cause, some of whom are minors, and her husband, Reese D. Gayle, her surviving; and leaving also considerable property other than that which is the subject of this suit. The bill alleges, and the answers admit, that she died intestate. Administration of her estate was granted to William Miller in March, 1872; who, about a year afterwards, reported the estate insolvent, made settlement of his administration and resigned; after which, there had been no other administrator before or when the bill in this cause was filed in August, 1874.

Complainants are the five children of said Mary L. Gayle, deceased; and the defendants are Marshall, the purchaser of the land, and William B. Shields, as surviving partner of the firms above mentioned, of which he had been a member. The surviving husband, Reese D. Gayle, was not made a party; nor was any of the other persons that claimed to be creditors of the estate.

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Among other things, the bill alleges that Marshall's notes were made payable and delivered to Milhouse & Shields for the payment of a debt of Reese D. Gayle to them, without the consent or knowledge of his wife; that she was greatly dissatisfied with and never ratified that particular of the transaction, and that there were no valid debts against the estate and it was not insolvent; all of which allegations are controverted. Complainants further say that they are too poor to give the bond necessary to enable any of them to become administrator, or to procure any other person to accept that office. And they pray that the court will decree to them the amount of the two notes that were given for the land, and a vendor's lien on the land to be enforced for the payment of the amount yet due from defendant Marshall.

JOHNSTON & NELSON, and SATTERFIELD & YOUNG, for appellants.—Mrs. Gayle's husband was an indispensable party. He was entitled to one half of the proceeds of the notes.—R. C. § 2379; *McMaken v. McMaken*, 18 Ala. 576. The administrator of Mrs. Gayle should have been made a party.—38 Ala. 64. After citing the various decisions on the subject, they contended that the only exception to the rule dispensing with administration, &c., is that "a court of equity will protect the possession of the distributees, or perhaps entertain a bill for distribution, where the distributees are in possession, or there is no adverse holding," but the active powers of the court can, in no case, be invoked by distributees to reduce the assets of the estate into possession, against an adverse holder. Here complainants seek to collect a debt, but there is no prayer for distribution or a settlement of the estate.

R. J. BOYKIN, *contra*.—There was no necessity for an administration. The decree of insolvency does not prove the existence of valid debts against the estate, but only fixes its status between the administrator and creditors.—30 Ala. 478. There were no debts which could bind Mrs. Gayle's statutory estate. The heirs could maintain this suit.—*Knight v. Blanton*, 51 Ala. 333.

MANNING, J.—Through the sale of the land by Mrs. Gayle and her husband, to Marshall, for the money and notes given by him therefor, that part of her real property was converted into personalty. And the bill proceeds upon the idea that the complainants are entitled to all of this, in her stead. But, in the first place, there is nothing to show that the proceeds of the land sold to Marshall were not

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properly invested for the benefit of Mrs. Gayle, in being made payable to Milhouse & Shields to discharge the property of her separate estate—perhaps of her equitable separate estate—from the mortgage to them; and, secondly, according to statute law, “if a married woman, having a separate estate, die intestate, leaving a husband living, he is entitled to one half of the personalty of such separate estate, absolutely, and to the use of the realty during his life.—R. C. § 2370. It is the statutory separate estate that is here referred to. And it follows, that there could be no recovery of the money sued for, in this cause, for the distributees of the estate of Mrs. Gayle, if such a suit were maintainable at all, unless the principal distributee, Reese D. Gayle, or the transferee of his share, if it has been transferred, were made a party to the suit. This not having been done, and no reason being shown for the omission, complainants, although there is no demurrer for that cause, could not be entitled to a decree in their favor. They claim the whole of a fund, while disclosing that another person, who is not made a party, plaintiff or defendant, has as good a title as theirs, to one half of it.

But this suit cannot be maintained, at all, by the distributees directly. The estate of Mrs. Gayle has been reported and declared insolvent, and is subject to administration as such. A list of the claims against it, was set forth with the report. So that not only are these credits to be collected from debtors, if the notes on which the present suit is founded be credits of the estate, but there are persons claiming as creditors, to be entitled to payment from the estate of debts due from it to them. It is only by an administrator, who succeeds to the title which was in Mrs. Gayle at her death, that the business of an estate so involved can be conducted, its assets be gotten in, its debts be ascertained, and distribution be made.

There are, it is true, decisions of this court, all of which are referred to in *Fretwell v. McLemore*, (52 Ala. 124) from which it appears that there may be exceptional cases, in which a court of equity will permit the distributees of an estate to maintain a suit in respect to their interests in it, without requiring the appointment of an administrator. But, “the rule, to be extracted from these decisions, is, that a court of equity will dispense with administration and decree distribution directly, when it affirmatively appears that if there was an administrator, the only duty devolving on him, would be distribution.” Such is not the case presented by this record. It comes under the general rule applied by this court in *Gardner v. Gantt* (19 Ala. 658). And the legal

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requirement, that there must be an administrator for the settlement of an estate, in and concerning which there are so many contrariant and conflicting interests and claims, cannot be obviated by the difficulty complainants may have to encounter in procuring his appointment.

We are compelled to hold that the decree of the Chancellor must be reversed, and the bill be dismissed. But the dismissal is without prejudice to the bringing of another suit about the same matter.

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Action on Account.

1. *Charge to jury; when properly refused.*—A refusal to give a charge, no matter what it asserts, is no ground for reversal, unless the record shows affirmatively that there was evidence tending to prove every fact it supposes; failing in this, the charge is considered abstract, and rightly refused on that account.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

This was an action brought by the appellee, Barksdale, against the appellant, Williams, to recover a balance due upon account. It appears that in the year 1876, Williams, being engaged in the turpentine business, made a contract with one Tilman to operate a certain turpentine orchard, known as the "Tilman orchard," under which Tilman agreed to pay to Williams one hundred and fifty-four dollars, to attend to the work and oversee the hands, and Williams was to pay the hire and furnish provisions for the hands engaged, and to receive and sell the turpentine, and out of the proceeds to reimburse himself for the expenses, the balance remaining to be credited to the one hundred and fifty-four dollars which Tilman had agreed to pay, and when that sum was paid, all the orchard was to belong to Tilman. In the month of May, 1876, Barksdale was, by consent of all parties, substituted for Tilman, and assumed his liabilities under the contract. Williams also had a contract with one Browning, to work another orchard, near the Tilman orchard, which the bill of exceptions recites was "similar to the contract with Tilman, and under which Browning was to pay Williams \$1,073, except that this indebtedness was to be paid by applying one-half of the crude turpentine from such

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orchard to the same, after paying all expenses out of such half." Barksdale was, in May, 1876, by agreement, substituted for Browning under this contract. The evidence as to whether the contracts had been complied with, was conflicting, the testimony of Barksdale tending to show that the Browning contract had been rescinded, and that he had over-paid the amount due under the Tilman contract, and had rendered services, and delivered turpentine over and above all expenses, to the amount claimed. Williams' testimony tended to show that the amounts due, under the contracts, had not been paid, and that there was due him for advances a large sum. The defendant then requested the following charge: "That if there appears either a joint enterprise, which has not been adjusted or settled or an agreement by which plaintiff was to receive one half of the proceeds of the rosin, and that had not been adjusted or settled, plaintiff cannot recover." This charge was refused, and its refusal excepted to, and is now assigned as error.

ALEX. MCKINSTRY, for appellant.

D. P. BESTOR, *contra*.

STONE, J.—The testimony in this record fails to explain very accurately the two several contracts, about which the witnesses speak. Its tendency is to show that Williams contracted to sell or lease the two turpentine orchards to Tilman and Browning, and to advance to them money with which to pay the wages and subsistence of the laborers. Williams was to receive and sell the turpentine, and out of the proceeds, reimburse himself for the advances, and then pay himself \$154 due from Tilman, and \$1,073 due from Browning. After this, "all the orchard was to belong to Tilman." The Browning contract differed from the Tilman contract, in that the payments to Williams were to be made by applying one-half of the crude turpentine from such orchard to the same, after paying all expenses of such half." What was to become of the other half of the turpentine, under Browning's contract, is not satisfactorily shown. In fact, it is left to conjecture. By agreement between all the parties, Barksdale was substituted for Tilman and Browning in the two contracts. There is no evidence that there was a "joint enterprise," or that "plaintiff was to receive one half the proceeds of the rosin." So, there is nothing to support the hypothetic case supposed in the charge asked. A refusal to give a charge, no matter what it asserts, is no ground of reversal, unless the record shows affirmatively that

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there was evidence tending to prove every fact it supposes.—
1 Brick. Dig. 338, § 40. Failing in this, the charge is considered abstract, and rightly refused on that account.

Affirmed.

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Action on Policy of Life Insurance.

1. *Deposition of witness ; when inadmissible.*—Where the deposition of a witness, residing outside of the State, is taken, and he afterwards comes into the court at the time of the trial, and remains at the place where it is held, his unexplained absence at the time it is proposed to introduce his evidence, although not subpoenaed by either party, will not authorize the party taking the deposition to read it; his absence not being shown to have occurred without their procurement or consent.

2. *Physician, opinion of, as to cause of death of assured ; when admissible.*—A physician who attended the assured in his last illness, may give his opinion as to the disease with which he was afflicted, and as to the cause of his death.

3. *Examining physician of insurance company ; what can not state.*—A life insurance company, when sued upon a policy issued by it, can not show by its physician, who, upon the report of the examination of the assured by another physician, had recommended the acceptance of his application, and upon whose recommendation the policy had been issued, whether he would have recommended the policy if he had known the assured was afflicted with lead poison, the assured not having answered, or been required to answer, upon that point in his application.

4. *Residence ; meaning of, in application for, and policy of life insurance.* A policy of life insurance, and the application for it, must be construed together, and in the absence of something showing a contrary intention, words used in one must receive the same meaning when used in the other. Thus construed, in this case, the word *residence* in the questions propounded the assured, intended to signify his place of permanent rather than of temporary abode ; in the sense of domicile, rather than of mere *inhabitaney*—and this being truly stated, the fact that the assured sojourned some year or two in another State did not render his answer untrue.

APPEAL from Circuit Court of Mobile.

Tried before Hon. HARRY T. TOULMIN.

This was an action brought by the appellee, Mrs. Kate Walker, against the appellant, to recover the amount of a policy issued by it in April, 1875, on the life of her father, Dr. Wood, and of which she was the beneficiary. Upon his application for insurance, Dr. Wood was required to answer various questions as to his residence, state of health, present and past ; the health, length of life, and cause of death of his relatives. The policy recited that it was made on the faith of these answers, and that if any of them were untrue, or if any fact, likely to influence the action of the company,

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was concealed, or if he died by his own hand, then the policy should be void. In answer to a question, "Where have you resided for the last ten years?" he had answered in his application, "Louisiana."

On the trial, the plaintiff offered to read the deposition of one O'Neal, which had been taken by her on interrogatories and cross-interrogatories, on the ground that the witness resided out of the State. Appellant objected on the ground that the witness was then in the city of Mobile. It was admitted by the parties that since the taking of the deposition, said witness had been sent for, and brought to Mobile by the plaintiff; that he was present in court when the trial commenced, and was then still in the city of Mobile. It appeared that the witness had not been subpoenaed by either party. The court overruled the objection, and permitted the deposition to be read to the jury, and the defendant excepted.

The evidence showed that the deceased went to bed apparently well the night before his death, and was found next morning in a dying condition, and in a profound stupor, from which he never revived, and died the same evening; and that a glass, with evidences of morphine on it, was found on the table near his bed. The plaintiff asked one of the witnesses, who was a physician, and had attended the deceased in his last illness, what, in his opinion, was the cause of his death; to this question the defendant objected, on the ground that it was irrelevant and illegal, and called for mere opinion. The court overruled the objection, and permitted the witness to answer; to which action an exception was reserved.

It appeared that the deceased was a native of Kentucky, who had moved to Louisiana and lived there many years; that about 1869 or '70, he went to Kentucky and remained there two or three years, taking his family and closing his office in Louisiana; but returned to Louisiana, resumed his business, and remained there till his death.

There was evidence tending to show that he went to Kentucky to have his daughter educated, and that while there he engaged in no business; that he was unwell during the time he stayed there, and then claimed Louisiana as his residence; that he frequently visited Kentucky previously to that time, and always claimed Louisiana as his home.

The court charged the jury on the subject, "that, if you find from the evidence that the deceased had a fixed residence in Louisiana, ten years before, and during the last ten years before his application for insurance was made, although he may have gone to Kentucky from time to time during that

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period, and though he may have remained there for one, two or three years, yet if you find that he went to Kentucky on business, or pleasure merely, without any intention of abandoning his residence in Louisiana, but with the intention of returning there, and, in fact, did return in accordance with such intention, then he did not lose his residence in Louisiana." To this charge the defendant excepted. 2d. "That, if the jury believe from the evidence that in the application made to obtain said policy, said assured was asked where he resided for the ten years past, and he answered in Louisiana, and the answer was, in fact, untrue, then the plaintiff cannot recover." The court gave the charge, but stated to the jury that it was to be taken in connection with the charge just given as above stated; and to this statement the defendant excepted.

On the trial, the defendant asked Dr. Toxey, a physician and witness for defendant, who recommended said policy, whether he would have accepted or recommended it, if he had known that the deceased had ever been afflicted by lead poison (there being evidence tending to show that he was so affected). This question was objected to by the plaintiff, and her objection was sustained, and defendant excepted.

The various rulings of the court, to which exception was reserved, are now assigned as error.

JOHN T. TAYLOR, for appellant.—The deposition of the witness should not have been admitted; the ground on which they were taken had ceased to exist, and the witness was within the jurisdiction of the court. All depositions in this State are taken *de bene esse* by statute.—See 2 Ala. 63; 9 Por. 654; 4 Ala. 641; 20 Ala. 182. The court erred in its charge as to the evidence of the deceased. The objects of the question were to ascertain where he had *lived* for the last ten years, so as to judge of his health or the impression made upon it. A man cannot *reside* in two States during the same time. *Residence* and *domicile* are very different. One may *reside* in several places and not lose his domicile. Bouvier's Dictionary—title, *Residence*; 2 Kent's Com. 561, note 3. The question asked by plaintiff, as to the cause of the death of the assured, was illegal, called for the expression of a mere opinion, and should have been excluded. The question proposed to be asked Dr. Toxey, should have been allowed. Representations in the application for policy, are warranties, and whether material or not, if untrue, vitiate the policy.—1 Otto, 510; 22 Wal. 47.

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taking of the deposition of O'Neal still existed, for he still resided more than one hundred miles away from the place of holding the court.—1 Brick. Dig. 551, § 18; 1 Ala. 237, 239. The question asked the physician who attended the deceased in his last illness, was competent. The opinion of a physician is competent evidence as to the cause of death.—Bliss on Life Ins. 607; 31 Iowa, 216. It is the settled law, that a man's residence is where he considers "home." No matter where he goes, if on pleasure or business, if *animus reverendi* is in him, his residence is not changed. Language in a policy or application, if ambiguous, must be construed in the sense in which the insurer had reason to suppose it would be understood, and most strongly against the company.—32 N. Y. 405; 3 Best. & Smith, Q. B. 917; 31 Iowa, 216. The question proposed to be asked Dr. Toxey, was clearly illegal; it was simply his opinion as to whether the risk was a good or bad one, and whether, had he known certain facts, which the application did not specifically inquire about, he would have acted as he did in recommending the application for acceptance.—See 27 N. Y. 282; 4 Bigelow Ins. Reports, 69; 7 Wend. 73; 5 Grey, 541; 14 Allen, 330.

BRICKELL, C. J.—1. The first question presented by the bill of exceptions, relates to the admissibility, as evidence, of the deposition of O'Neal, taken at the instance of the appellee, on the ground that the witness resided without the State. The appellee subsequently procured the personal attendance of the witness, and he was in court when the trial was commenced, and was in the city of Mobile at the time it was proposed to read the deposition. The cause of his absence from the court at that particular time was unexplained, nor was it shown to have been without the consent of the appellee. All depositions are taken *de bene esse*, or rather provisionally, and if the cause for taking the deposition (with some exceptions provided by statute, not material to be now noticed), does not exist at the time of the trial, it cannot be used as evidence. The reason of authorizing the deposition of a witness residing without the State, to be substituted for his oral examination in the presence of the court, and of the parties is, that he is beyond the jurisdiction of the court, and without the reach of its process, and consequently the party desiring his evidence cannot compel his attendance at the trial. When, however, the witness is present in court, at the time the trial commences, subject to its jurisdiction and process, and remains at the place of holding the court, his unexplained absence at the time it is proposed to introduce his evidence, will not authorize the reading of his deposi-

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tion. If it had appeared that from sickness, or other inability not superinduced by the act of the party taking the deposition, the witness could not attend personally, it may be the deposition should not be excluded, if his actual residence without the State continued. But, in the absence of any explanation of his absence, and of all acquittal of the party taking the deposition from connivance or consent to such absence, the deposition should be excluded. The cause for taking the deposition—the non-residence of the witness—may continue as a fact, but the consequence of the fact, which forms the reason for accepting the deposition in the place of a personal examination in open court, the absence of the witness from the jurisdiction of the court, and beyond the reach of its compulsory process, does not exist. The taking of depositions is in derogation of the common law, and experience has proved that it is not a mode of procuring satisfactory evidence, free from suspicion. More often than otherwise, the testimony is couched in the language of the commissioner, rather than that of the witness, and the result is, the testimony has an effect variant from that which would be produced if the witness was produced and gave expression to his knowledge in his own words. The jury are deprived of the opportunity of seeing the manner of the witness, and observing whether he testifies with reluctance for the one, and with readiness for the other party. And the party “who prepares the witness, and examines him, can generally have so much or so little of the truth, or such a version of it as will suit his case.” It is only in obedience to statutes that such evidence is admissible, and the spirit and reason of the statutes would be contravened by accepting the deposition of a witness within the jurisdiction, and the verge of the court, when the trial commences, and who, without cause or reason, absents himself just at the moment it is proposed to introduce his evidence.

2. The cause of the death of the assured seems to have been matter of controversy, and there was evidence having some tendency to show that he had been using morphine, and from which an argument could have been addressed to the jury, that his death was voluntary, from its unnecessary and excessive use. The appellee was permitted, against the objection of the appellant, to examine the physician attending the assured in his last illness, as to his opinion, as to the disease with which he was afflicted, and the cause of his death. To the general rule, that a witness must testify to facts, and not to inferences or conclusions from facts, or to mere matters of opinion, an exception as old as the rule is recognized in favor of experts having peculiar knowledge or

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skill, in reference to the subject matter of the inquiry.—*Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *Bennett v. Fail*, 26 Ala. 605; *City Council v. Gilmer*, 33 Ala. 116. The most frequent illustration of the exception, is that of a physician or surgeon. The opinions of these, “as to the cause of disease, or of death, or the consequence of wounds, and as to the sane or insane state of a person’s mind, as collected from a number of circumstances, and as to other subjects of professional skill,” it is of constant practice to receive, and it forms generally the most satisfactory evidence. 1 Green. Ev. § 440. In actions on life insurance policies, such opinions are received when the question is, whether there was a bodily infirmity not disclosed, or the question is as to the cause of death.—*Bliss on Life Ins.* § 392, p. 606; *Miller v. Mut. Benefit Life Ins. Co.* 31 Iowa, 216.

3. There seems to have been evidence tending to show that the assured was afflicted with lead poison. He was not required to disclose specially whether he had been, or was so afflicted, at the time of the insurance. The appellant proposed to inquire of its own physician, who had, on the certificate of the examining physician, and the answers of the assured to the interrogatories propounded to him, recommended the issue of the policy, whether he would have given the recommendation if he had known the assured had ever been afflicted by lead poison. We cannot regard the evidence as admissible. It did not involve any question of skill or science, but, in effect, required the witness to answer, after the risk had proved unfortunate, or hazardous, what he would have done if facts had been known to him on which he had not been required to act. The inquiry, as propounded, assumed, also, the existence of a fact, which the evidence merely tended to prove.—*Racls v. Am. Mutual Ins. Co.* 27 N. Y. 382.

4. The term *residence*, as employed in the questions propounded to the assured, was intended to signify the place of permanent, rather than mere temporary abode; in the sense of *domicile*, rather than of mere *inhabitaney*. It is undisputed that the *domicile* of the assured was truly stated, and that his sojourn in Kentucky was merely temporary. The *domicile*, and the place of temporary residence, are each within the territorial limits, in which, according to the stipulations of the policy, the assured had the right to *visit* or *reside*. The policy and the application must be construed together. Residence, as employed in the one, must have the same signification it bears in the other, there being no indication of an intention to employ them in a differing signification. The word *visit* is manifestly employed in the policy

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in contradistinction to the word *reside*. The one conferring the right to travel and sojourn, and the other the right to acquire domicile by residence with the intention of remaining. The court did not err in the instruction given, or in refusing that requested on this point.

For the error in admitting the deposition of O'Neal, the judgment must be reversed, and the cause remanded.

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Action to Recover Share of Profits arising from sale of Land.

1. *Contract; rescission of, what sufficient to support.*—The parties to a contract may rescind or modify it at pleasure, and their mutual assent is all that is necessary to support the rescission or modification.

2. Where three persons, desiring to purchase jointly a tract of land, at a sale for partition to be made, under a decree of the Probate Court, enter into a written contract, which specifies what portion of the land each is to obtain, and that the price to be paid by each is to be determined by three disinterested persons, and one of them afterwards buys at a private sale, an undivided two-thirds interest in the lands, of which purchase his two associates are fully informed; and by subsequent written contract, which expressly rescinds the former, it is recited and stipulated that "they have entered into a combination to purchase the tract of land," "the place to be purchased by C.," who was the purchaser at the private sale, and that they "agree to sell" a particular portion to M., at a specified price, and that "J. is to have" another part "at the rate per acre that the land is bid in at," and that C. is to have "all the balance of the tract at the price bid at the sale;" and further, that J. is to pay one-third of the difference, "between the costs of the portion sold to M. and its sale at \$5.50," and that C. is to pay the remaining two-thirds; *held*, that the rights of M. and J. were to be determined by this subsequent contract, and were dependent on C.'s becoming the purchaser at the sale for partition; and another person having become the purchaser at that sale, at a price which refunded to C. more than he had paid for the interest purchased at private sale, that M. and J. had no claim to a share of the profits.

APPEAL from Circuit Court of Dallas.

Tried before Hon. GEO. H. CRAIG.

This was an action brought by the appellee, McIlwaine, against the appellant, to recover a sum of money alleged to be due under the following circumstances: Cooper, McIlwaine and one R. D. Jackson desired to purchase certain parts of a tract of land then owned by a minor, one Goldsby King, and Woods and wife, as tenants in common. Proceedings for a sale of this land, for division, were then pending in the Probate Court. In furtherance of this desire they entered into an agreement, in writing, on the 2d day of October, 1874, by which they agreed jointly to purchase the whole

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tract, each to receive certain portions of it, and the amount of the purchase-money to be paid by each to be determined by three disinterested persons. Cooper having expressed some dissatisfaction with the first agreement, the parties to it met, and on the 15th day of October they entered into the following agreement, in writing:

"This agreement certifies that we, the undersigned, have entered into a combination to purchase the tract of land known as the Cross Roads, on Summerfield road, the place to be purchased by C. M. Cooper, and we agree to sell the field containing 112 acres, more or less, lying west of Summerfield road and south of Craig's ferry road, at \$5.50 per acre, to John McIlwaine; Dr. Jackson to have the 80 acres, more or less, lying on the Craig's ferry road, north side, and fronting on said road, (south half section, next to land of Jackson's,) he to pay at the rate per acre that the land is bid in at; C. M. Cooper to have all the balance in said tract of 466.50 acres, not described above, and at the price paid for the same. Dr. R. D. Jackson further agrees to pay one-third ($\frac{1}{3}$) difference between cost of the 112 acres sold to Mr. McIlwaine and its sale at \$5.50 per acre. C. M. Cooper agreeing to pay the remaining two-thirds, as difference between cost and sale of above named field. All other agreements made before this to be null and void.

C. M. COOPER,
J. H. McILWAINE,
R. D. JACKSON."

The complaint set out these two agreements and averred that, in pursuance to the first one, plaintiff had furnished the defendant \$500 to be used in the purchase agreed on, and that in pursuance of said agreement Cooper did purchase, on the 6th day of October, 1874, for himself, plaintiff and Jackson, an undivided two-thirds interest in the lands for \$2,000, taking title to himself; and that after the second agreement, Cooper had sold the interest thus purchased for twenty-seven hundred and two dollars and sixty-six cents; that the plaintiff was entitled to one-fourth of the proceeds of said land, and that the defendant had paid him only \$500 and refused to pay any more. Defendant filed a plea which set up these agreements; averred that the latter rescinded the former; that no part of the money furnished by plaintiff was used in the purchase of the interest in the lands; that since the last agreement was entered into he had not purchased any interest in the land; averred that the \$500 advanced by plaintiff was done under the last agreement, and that in pursuance of it he had returned that amount to plaintiff; and denied the right of plaintiff to share in the

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proceeds of his interest in the lands. A demurrer to the complaint, on substantially the same grounds, had been overruled.

Plaintiff, as a witness for himself, then testified that at or about the time of executing the first agreement, he had been informed that the land above described was for sale; that one Coosa Woods, a married woman, was the owner of a two-thirds interest in the same, the residue being owned by one Goldsby King, a minor; and that the said Coosa Woods and her husband had commenced proceedings in the Probate Court for a sale for partition; that he desired to purchase part of the land, and with Dr. Jackson and defendant entered into the agreement of October 2, 1874. Plaintiff further testified, against the objection and exception of defendant, that before the agreement was entered into it was understood between the parties that the interest of Coosa Woods could be purchased at private sale for \$2,000, and that he and Jackson told the defendant to try it, and that they would furnish the money to pay for their respective interests as proposed, and that the agreement was entered into under this understanding; that shortly after this, he received a postal card from defendant, telling him that he desired plaintiff and Jackson to furnish their proportion of the money for said lands, and that accordingly, in a short time, he went to Selma and handed Cooper \$500, and took his receipt for the same, but that he did not remember the exact date of the payment of the money to him; that an order was granted for the sale of the lands for partition; that on the 15th day of October, 1874, some dissatisfaction having grown up on the part of Cooper about the contract of the 2d of October, 1874, the parties met in Selma and entered into the agreement of that date; that on the 23d of November, 1874, the commissioners appointed by the Probate Court sold the land at public auction, and that one Lawrence Montgomery and defendant Cooper were bidders at the sale; that Cooper ran the lands up to \$8.75 an acre, when the plaintiff told him he was out, and was not willing to bid more than that for said lands; that the lands were then knocked down to said Montgomery at \$8.80 per acre; and that on the same day, after the sale, he applied to defendant for the return of the \$500 advanced by him, which defendant accordingly did; that he did not remember to have claimed at that time any of the profits arising from the sale, but was distinct in his recollection that he did not say he would not claim any part of them. Jackson also testified as to the understanding with which the agreement of the 2d of October was entered into, substantially as the plaintiff had done. The defendant then

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testified in his own behalf, that he bought the interest of said Coosa Woods for himself and not for Jackson and McIlwaine, and that he paid \$2,000 therefor, and received a deed from said Coosa and her husband on the 6th of October, 1874; that the contract of 2d of October, 1874, was not entered into with relation to the interest of Mrs. Woods, but related to the whole tract; that the \$2,000 paid for her interest was his own money, and no part of it belonged to McIlwaine; that he did not obtain the money from McIlwain until the 16th day of October, as shown by the receipt given for it, which he then introduced in evidence; that the sum then received was the first and only money which he had received from McIlwaine, and that he had refunded the same to McIlwaine on the day of the commissioners' sale; and that McIlwaine, at that time, stated that he claimed no share in the profits of the sale; that he failed to purchase the whole tract at said sale because plaintiff and Jackson were unwilling to bid any higher for the land, and he was unable to pay for the whole tract. This was, in substance, all the evidence, and the court, at the request of plaintiff, charged the jury that if they believed, from the evidence, that the contract of October 2, 1874, was made by the parties, and that in pursuance of this contract Cooper purchased Mrs. Woods' two-thirds interest in said land, on the 6th of October, 1874, and paid \$2,000 and received a conveyance, and that the plaintiff furnished \$500 to defendant towards such sale, then the plaintiff was entitled to receive his share of the profits made by said Cooper on the purchase and sale of said interest, notwithstanding said contract was made null and void by the one made on the 15th of October, and the \$500 returned to plaintiff; that if the jury believed that the parties made the agreement of 15th of October, and that Cooper had previously, under the contract of 2d of October, purchased the interest of Mrs. Woods in the lands, and that on the 16th of October McIlwaine furnished the \$500 to Cooper and took from him the receipt in evidence, and that afterwards the said lands were sold by the commissioners and Cooper received the proceeds of the share of Mrs. Woods, then the plaintiff would be entitled to recover in this action one-third the profits arising from this sale, and this notwithstanding they might believe from the evidence that Cooper, after said sale and before this suit, refunded to McIlwaine the \$500 according to the terms of the receipt. These charges were separately excepted to by the defendant. The court refused several charges asked by the defendant, which asserted, in substance, that the rights of the parties depended solely on the contract of October 15th, and that if under that contract

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the defendant had failed to become the purchaser of the tract because of the fault or interference of the plaintiff, then there was no cause of action.

BROOKS & ROY, for appellants.

MORGAN, LAPSLEY & NELSON, and P. G. WOOD, *contra*.

BRICKELL, C. J.—There can be no doubt that the parties to a contract may rescind or modify it, at pleasure; and their mutual assent is all that is necessary to support the modification or rescission. The agreement made by these parties on the 2d day of October, 1874, was by their mutual assent, expressed in writing, rescinded, and a new contract made, materially variant in stipulations and in the rights to which the parties were entitled. This latter contract, alone, can be regarded in ascertaining the rights and relations of the parties. It was entered into after McIlwaine and Jackson had been fully informed of Cooper's purchase of the interest of Woods and wife in the lands, and did not contemplate an acquisition by Jackson and McIlwaine, or either of them, of any right in that purchase. The interest it was contemplated they should acquire, was in particular parts of the land, if the whole tract was purchased by Cooper, at the sale to be made subsequently under the decree of the Court of Probate. Their rights and interests depended wholly on such purchase, and it was a right to and interest in particular parts of the tract, at a specified price, or a price readily ascertained by calculation, if the purchase was made. If Cooper had not purchased at the subsequent sale, and the price for which the lands sold, would not have repaid him the same he had paid Woods and wife, he would not have had a right to retain for any part of the difference, from the five hundred dollars McIlwaine had deposited with him. McIlwaine could have well said, I never ventured with you into that speculation, and can not bear any part of its losses. The error which underlies the instructions given by the court, and its rulings on the demurrers, and in its refusal of several of the instructions requested by the appellant, is, in the supposition that the parties were equally interested in the purchase of the lands, and that Cooper's purchase of Woods and wife, was but a part of the purchase contemplated. The contract has no reference to Cooper's purchase of Woods and wife. The purchase it contemplated was to be made subsequently, at the public sale made by the commissioners under the decree of the Court of Probate. That purchase was to be made by Cooper, and the rights of McIlwaine and

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Jackson were dependent on the purchase being made. If it was made, McIlwaine was entitled to one hundred and twelve acres, at \$5.50 per acre, without regard to the price paid at the sale. Jackson was entitled to eighty acres, at the price bid for the whole, and if that price exceeded the price paid by McIlwaine for the one hundred and twelve acres, Jackson promised to pay one-third of the excess, Cooper losing the remaining two-thirds. McIlwaine and Jackson had the right to the lands described, on the terms expressed, if Cooper made the purchase. They had no other rights, stipulated for no other, and the only obligation Cooper assumed, and the only duty he was under to them, was in good faith to make the effort to purchase the lands, when offered for sale under the decree of the Court of Probate, and if he purchased to let McIlwaine and Jackson take, under the terms of the contract, the parts of the land described. They had no right to participate in any of the profits he may have realized by his purchase from Woods and wife, which purchase was prior to the contract, and of which the parties had full knowledge when they contracted. On the facts found in the record, there is no ground on which the action can be supported, and without noticing the several rulings of the court, it is enough to say, they are inconsistent with the views we have expressed.

The judgment is reversed and the cause remanded.

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Detinue.

58	301
107	416
58	301
112	176

1. *Deposition; motion to suppress; when too late.*—It is too late to make a motion for the first time to suppress an entire deposition, after the parties have expressed themselves ready for trial and announced satisfaction with the jury.

2. *Demurrer; rulings on; when not revised.*—Where rulings upon demurrer are not shown by any judgment entry, the appellate court will not revise them, although the bill of exceptions recites what such ruling was.

3. *Detinue; what not pleadable in bar or abatement of.*—The failure to find and seize the property sued for, can not be pleaded in bar or abatement of an action of detinue.

APPEAL from Clarke Circuit Court.

Tried before Hon. H. T. TOULMIN.

The appellee Wing brought detinue, the complaint being in the form prescribed by the Code, against appellant, Morgan, to recover a mule and wagon.

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Wing made affidavit, which he neglected to sign, before the clerk, and gave bond to obtain an order of seizure of the property. The clerk failed to approve the bond in writing, but made the proper order directing the sheriff to seize the property, and the sheriff made return that he had served a copy of the summons and complaint on the defendant, but could not find the property.

The defendant moved the court to dismiss the case, because the property sued for was not found or seized; but the court overruled the motion.

The defendant then demurred to the complaint, because plaintiff's affidavit was not signed by him; because the bond was not endorsed 'approved by the clerk,' and because no levy had been made on the specific property sued for. The action of the court upon the demurrer is not shown by any judgment entry, but the bill of exceptions recites that it was overruled.

After the parties had announced themselves ready for trial, and that they were satisfied with the jury, and "as plaintiff's counsel was about to read the complaint to them, defendant moved to suppress the entire deposition of one Riddle, one of plaintiff's witnesses, on the ground that the certificate of the commissioner was defective," &c. The court overruled the motion and the defendant excepted.

The refusal to dismiss the cause; the overruling of the demurrer, and of the motion to suppress the deposition of Riddle, are now assigned for error.

JOHN Y. KIRKPATRICK, for appellant.

THOS. H. PRICE, *contra*.

STONE, J.—When both parties announce themselves ready for trial, and express themselves satisfied with a jury empaneled for the trial, the trial is so far entered upon, as to preclude the consideration of a motion then for the first time made, to suppress an entire deposition taken in the cause.—Code of Ala. § 3081.

The ruling on demurrer, not being shown in the judgment entry, can not be considered by us. If it could, there is nothing in the present demurrer, which, if a defect at all, could be reached in that form. The demurrer only brings up the sufficiency of the complaint.

In an action to recover chattels in specie, a failure to find and seize the property sued for, is no defense, either in abatement or bar.

Affirmed.

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Potter & Son v. Gracie.

Bill in Equity to set aside Fraudulent Conveyance.

1. *Conveyance ; what void as to creditors.*—A conveyance to a mistress, or to her illegitimate child, though intended merely as a provision for maintenance, and not looking to future cohabitation, is void as against existing creditors.

2. *Conveyance to mistress ; what necessary to support*—To support a conveyance to a mistress, on the ground of valuable consideration, there must be clear and convincing proof of such consideration, to overcome the unfavorable inferences which the court would draw from the illegal relation existing between the parties.

3. *Consideration ; proof of different, from that stated in conveyance.*—If the conveyance itself recites that it is made on divers good considerations, and for kindness felt by the grantor towards the grantees, (the mistress and her child), parol evidence can not be received to show a valuable consideration.

4. *Conveyance in fraud of creditors ; for what purpose may be allowed force.*—When a voluntary conveyance, not tainted with actual fraud, is set aside in equity, at the instance of existing creditors, it will, nevertheless, be allowed to stand as a security to reimburse the grantee, for money paid by him in removing a valid incumbrance on the property.

5. *Same ; for what grantee must account.*—If the grantee has been put in possession of the property under the conveyance, the value of the use and occupation will be charged against him, and set off against moneys paid by him for taxes and insurance, and in removing prior incumbrances.

APPEAL from Chancery Court of Dallas.

Heard before Hon. CHARLES TURNER.

This was a creditor's bill, filed by the appellants, Lewis W. Potter and sons, and John Helton, against R. M. Nelson, administrator of James Johnston, Mary Gracie and William Gracie. The object of the bill is to set aside a conveyance made on the 29th day of July, 1871, by James Johnston, in his life time, to Mary Gracie for life, remainder to William Gracie, her son, as fraudulent as to his creditors. The bill alleged that complainants were creditors of Johnston before the making of the deed ; that at the time of its execution Johnston was insolvent, and owned but little other property than that conveyed ; that no money, or other thing of value, was paid by Mary Gracie, and that at the time of the making of the deed Mary Gracie was the kept mistress, or concubine, of Johnston, and continued to be so up to the time of his death ; that the purpose of Johnston in making the deed, was "to induce Mary Gracie to live with him in a state of prostitution, and to continue to be and remain his kept mistress."

Mary Gracie answered, denying that Johnston was insol-

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vent at the time of executing the deed, and averring the contrary. She also denied that there was no consideration for the deed, or that it was made to induce her to remain or live with him, as his mistress. She averred that, at and before the execution of the deed, Johnston was indebted to her, in a sum exceeding the amount paid for the lot, and that he purchased the lot at her request, with the money he owed her, taking title to himself, because the owner of the lot would not permit her (she being a colored woman) to become the purchaser; that the money paid by him was part of what was due her, and that in pursuance of his agreement to purchase for her, he made the deed to her and her son, which the bill assailed. This deed recites that it is made on divers good considerations, and for kindness the grantor feels towards Mary Gracie and her child Willie, or William. The answer also set up that she had made valuable improvements on the land, which was unimproved when conveyed to her; that at the time Johnston conveyed to her, there was an incumbrance on the lot for part of the purchase-money due by him, and that she had since paid off this mortgage; and that the lot would not sell for enough to reimburse her for the improvements and payment she had made to remove the incumbrances on it. She positively denied that the sale was made by Johnston with intent to hinder, delay or defraud his creditors, or that she received the deed with such intent, or knew of, or in any manner participated therein.

The evidence tended to show that Mary Gracie, who was formerly the slave of Johnston, had lived with him as his mistress for some time after emancipation, and that after she ceased to live on the same place with him, she frequently visited him, and he visited her, still continuing to cohabit with him until his death; that William Gracie was their child, born of such illicit intercourse soon after the war. The evidence, tending to show indebtedness of Johnston to her, was chiefly of loose declaration made by Johnston to the negroes on the plantation, where they lived, and her own testimony that he owed her for services rendered as his house-keeper, and had bought the lot for her in payment therefor. She introduced no written evidences of this indebtedness to her. She proved that she had paid the taxes and insurance on the property since she had been in possession, and it was also shown that she had paid off the mortgage given for the purchase-money. The carpenter, who built the house on the lot, testified that he contracted with and was paid by Johnston. The evidence tending to show that the consideration of the deed was the past indebtedness of Johnston to Mary Gracie, was objected to, because it tended to contradict the recitals of the deed.

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On the hearing, the Chancellor dismissed the bill for want of equity, and this decree is here assigned as error.

MORGAN, LAPSLEY & NELSON, for appellants.

SUMTER LEA, and REID & MAY, *contra*.

BRICKELL, C. J.—A contract, the consideration of which is future illicit cohabitation, like all agreements to do acts forbidden by the law of God, or in furtherance of immorality, is utterly void. If it has been executed, no court of law or equity will, at the instance of either party, interpose to set it aside. The courts apply the maxim, "*In pari delicto, potior est conditio defendentis*," abstaining from interference to enforce or to vacate.—Story on Con. 5543; *Black & Manning v. Oliver*, 1 Ala. 449; *Walker v. Gregory*, 36 Ala. 180. A contract or conveyance, in consideration of past cohabitation, intended or regarded as reparation, or indemnity for the wrong done, is treated at common law as founded on a good consideration. If executory, and under seal, the seal conclusively importing a consideration, it may be enforced; but if not under seal, a mere simple contract, the consideration of which may be impeached by plea and evidence, it stands on the same ground with other contracts or agreements, having only the performance of a natural or moral duty as a consideration to support them.—Story on Con. 541; Chitty on Con. 661-62; *Singleton v. Bremar* (Harper's Law), 201; *Binnington v. Wallis*, 4 Barn. & Ald. 650; *Marchioness of Anondale v. Harris*, 2 Peere Wm. 432; *Gray v. Matthias*, 5 Ves. 286. A conveyance to a mistress, or to her and her children, by way of gift or advancement, not looking to future cohabitation, intended merely as a provision for maintenance, cannot be sustained against existing creditors. It stands, as would any other conveyance, springing not from motives of justice, but from motives of affection, or generosity, or prudence. The claims of creditors rest on legal obligations, higher than the demands of affection, or generosity, commendable as may be a response to these, when there are not duties which the law declares paramount.—*Wait v. Day*, 4 Denio, 439; *Sherman v. Barrett*, 1 McMullan, 147.

It is not, perhaps, important to inquire whether the conveyance now impeached rests on a consideration of past or of future cohabitation. If the latter is its consideration, having been executed, it is valid and operative against the grantor, his privies in blood and in estate.—*Walker v. Gregory*, *supra*. If the former is its consideration, the conveyance is voluntary. It is the settled law of this State that a con-

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veyance, not founded on a *valuable* consideration, is absolutely void as to the existing creditors of the grantor. No inquiry is indulged into the intent with which it is made. The intent is material only when the rights of subsequent creditors are involved. Then, if it is tainted with actual fraud, it is void.—2 Brick. Dig. 21, §§ 100-119. The complainants are creditors of the grantor, and their debts existed at the execution of the conveyance. As to them, the conveyance is void, because its consideration is not *valuable*. The inflexible rule of the law is, *that the man must be just before he is generous*. The claims of wife and children, of all who are bound by the ties of natural affection, and relations the law recognizes and favors, must yield to the paramount legal duty of the debtor to creditors. If these claims are subordinate, surely all claim which is the result of an immoral, illegal, meretricious connection, cannot stand on higher ground.

As is usual, and is to be expected in cases of this character, it is attempted to support the conveyance by evidence of a *valuable* consideration. Services rendered by the mistress, or a loan of money, for the payment of which no written evidence is taken, proved by the loose declarations of the grantor, made to witnesses having no interest to direct their attention to them, and no motive for preserving a distinct remembrance of them, have often been asserted as the consideration of conveyances, made between parties living in illicit intercourse. Criminal as may be their conduct, there is no legal inhibition against their contracting with each other, and if their contracts are not infected by the illegality of the relation—if they are supported by a *valuable* consideration, they will be upheld and enforced. The existence of the relation must excite the jealousy of the court called to inquire into the validity of the contract. If the character of the contract is such as would naturally spring from the relation, and is not such as would be expected, if it was founded on a valuable consideration. moving between the parties, as if they were strangers dealing with each other, clear and convincing proof of the consideration must be given to neutralize the unfavorable inferences the court would feel constrained to draw. For many years prior to the execution of this conveyance, the relation between the grantor and the grantee for life, was that of concubinage. Beginning while she was his slave, the remainderman was born of the illicit intercourse; after emancipation, it continued until his death severed it in 1873. There may be no evidence of a distinct agreement, when the conveyance was executed, that the relation should continue, yet it cannot be doubted its continu-

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ance was contemplated, and there is no reason for supposing that, if its dissolution had been suggested, the grantor would have executed the conveyance. Reparation for the wrong he had inflicted, there is not a fact in evidence tending to show he intended. If he was penitent, and intended to atone for the wrong, it is not apparent from any act or declaration found in the mass of evidence in the record. The character of the conveyance is, that to be expected from the condition of the parties—a gift to the mistress for life, with remainder to the child, the offspring of the cohabitation. If a *valuable* consideration, a debt due to the mistress, had been the consideration of the conveyance, it is not probable she would have consented that her estate in the premises should be limited to her life; and if she died, the remainder should have been limited to the son to the exclusion of her after-born children, if any she had. Such limitations are not usual in deeds of bargain and sale, into which it is sought, by parol evidence, to convert this conveyance, when the consideration moves from one grantee to the grantor. These are the limitations which would be expected in a settlement upon a mistress and her illegitimate child. Fraud, or illegality, is not presumed, it must be proved; and often it is shown by circumstances, rather than by direct evidence. The inferences which must be drawn from the relation of the parties, and the character of the conveyance, as to its real consideration, must be repelled by clearer and more convincing evidence of a *valuable* consideration than that the appellees have introduced.

Without regard to the weight of the evidence, however, we are constrained to declare that it was inadmissible, and could not contradict or vary the consideration expressed in the conveyance. The deed recites that it is made on *divers good considerations, and for kindness, the grantor feels towards Mary Gracie, and her child Willie or William*. A deed may be supported by a *good* consideration, or a *valuable* consideration. If it rests merely on a *good* consideration, it is subordinate to the rights of existing creditors, valid and operative against the rest of the world; while a *valuable* consideration frees it from impeachment, if it is not tainted with a fraudulent intent. "A *good* consideration, is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence and natural duty; a *valuable* consideration, is such as money, marriage, or the like, which the law esteems an equivalent for the grant, and is therefore founded in motives of justice."—2 Black. 296-7. It is the settled law of this State, that a deed impeached by creditors for fraud, actual

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or constructive, cannot be supported by evidence of consideration different from those alleged in it.—*Murphy v. Br. Bank of Mobile*, 16 Ala. 90. It is at all times dangerous to relax the conservative principle of law, which declares that, when parties enter into a contract and reduce its stipulations to writing, the written memorial is the sole expositor of the contract, and cannot, in the absence of fraud, be waived by parol evidence. Mistake may occur, requiring a court of equity to intervene and correct, so that the contract may conform to the intentions the parties proposed expressing. But without fraud or mistake, as between the parties, the written contract is conclusive. When assailed by creditors, it must be taken as to the parties to it, as it may be written. It can not be supported by falsifying express recitals, which it must be presumed were deliberately made and deliberately accepted.—*Watt v. Grove*, 2 Sch. & Lef. 500; *Bump on Fraud*. Con. 557.

In courts of law, if an instrument is avoided for fraud, or illegality, it becomes a mere nullity. In equity, it may stand as a security for advances which have been made, or liabilities which have been incurred, in consequence of it, if, under all the circumstances, it would be right and just it should stand.—*Clements v. Moore*, 6 Wall. 299; *McMakin v. Edmunds*, 1 Hill Ch. 294; *Boyle v. Donald*, 1 Greenl. Ch. 478. The mortgage to Weaver was an incumbrance on the premises, at the time the conveyance was executed. If this mortgage was satisfied by the grantee for life, after the execution of the conveyance, with moneys not derived from, or furnished her by the grantor, she has an equity to be substituted to the rights of the mortgagee.—*Bump on Fraud*. Con. 574. The complainants demanding equity, must render it to their adversary. They would not render it, if allowed to subject the property to the payment of their debts, freed from the mortgage which was a prior incumbrance on the premises. If that mortgage was extinguished by the appellee from her own means, her intent was to perfect the title, she and her child acquired by the voluntary conveyance, which is not tainted with an actual intent to defraud creditors, but is void only by operation and construction of law. The equity of the complainants is to subject the premises in the condition in which they were, when their grantor executed the conveyance assailed—they are without equity, to avail themselves of the incumbrances, the grantee may have removed, or to take from her without compensation, the benefit of such incumbrances.

The evidence does not satisfy us, any improvements were made by the grantees, except from moneys furnished by the

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grantor, after the conveyance was executed. It is not necessary, therefore, to determine, whether if any had been made, compensation for them can be claimed.

The premises have been in the occupancy of the grantee, since early in 1871. The value of the use and occupation, from the filing of the bill, to the day of the sale of the premises, as hereinafter directed, must be ascertained, and set off against the money expended in satisfying the mortgage to Weaver, and against the taxes, and insurance on the premises the grantee for life may have paid, since the bill was filed.

The decree of the chancellor must be reversed, and the cause remanded for proceedings in conformity to a decree which will be here rendered.

It is ordered, adjudged and decreed, the deed from James Johnson to Mary Gracie, for life, remainder to her son Willie or William, of date July 29, 1871, conveying the premises therein described, and described in the original bill, is void as against complainants, and all other creditors of the said James Johnson, whose debts were existing at the date of said deed.

It is further ordered, adjudged and decreed, that the register of the fifth district, of the middle chancery division of the State of Alabama, will sell the said premises, at public outcry, to the highest bidder for cash, at the court-house door, or some other suitable public place, in the city of Selma, having first given thirty days notice of the time, place and terms of sale, by advertisement in some public newspaper printed in the said city of Selma. He will make the purchaser, on payment of the purchase money, a conveyance of the premises, and will put the purchaser in possession, and will report said sale to the court for confirmation.

It is further ordered, adjudged and decreed, that the register take and state an account of the debts due and owing the complainants respectively, from said James Johnson, described in the original bill, computing interest thereon, to the day of taking said account.

It is further ordered, adjudged and decreed, that the register take and state an account of all monies paid by the respondent, Mary Gracie, from her own means, and not from means or monies furnished her, or by her derived from James Johnson, in satisfaction of the mortgage, executed by said Johnson to Ann P. Weaver, computing interest on each of said payments to the day of taking said account. And the register will also take and state an account of all taxes assessed on the said premises, after the filing of the original bill, and of all insurance thereon, after the filing of said bill,

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which have been paid by the respondent, Mary Gracie, computing interest from the day of such payments respectively, to the day of taking said account.

It is further ordered, adjudged and decreed, that the register take and state an account of the value annually, of the use and occupation of said premises, from the day of the filing of the original bill, to the day of the sale of the said premises, computing interest on the value of each year's occupation, from the end of the year, to the day of taking said account.

It is further ordered, adjudged and decreed, the value of such use and occupation, so ascertained, shall be set off against the amount ascertained to be due the respondent, Mary Gracie, for payments made by her in satisfaction of the said mortgage, and of taxes and insurance.

It is further ordered, adjudged and decreed, that if there shall be a balance due the respondent, Mary Gracie, on taking the said accounts, such balance shall be first paid from the proceeds of the sale of said premises, after deducting the costs of this suit, and the expenses of said sale, and the balance of such proceeds shall be applied to pay the debts due and owing the complainants, as ascertained by the register. If such balance will not pay the whole of said debts, then it shall be applied to them in proportion to their respective amounts.

All other questions are reserved for the decision of the chancellor. In taking the several accounts, the register will use the depositions already taken, so far as relevant, and such other evidence, as is on file, and may examine, orally, such witnesses as the parties may produce.

The register will report his action, under this decree, to the chancellor, for confirmation.

The respondent, Mary Gracie, must pay the costs of this appeal.

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Bill in Equity for Discovery and Account.

1. *Executor, de son tort; when protected.*—An executor, *de son tort*, can not, by his wrongful act, acquire a benefit, but is protected in all acts, not for his own benefit, which the rightful representative may do.

2. *Same.*—Where one has received and used assets of an intestate, under circumstances constituting him an executor *de son tort*, he may show, when

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called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration.

3. *Widow; what will not constitute her executor, de son tort.*—A widow, retaining and using property exempt from administration, for the support of herself and minor children of her husband, who died intestate without debts, is not guilty of any conversion which can render her an executor *de son tort*; nor can the husband's administrator call her to account for the children's share upon their reaching majority—this right belongs to the children.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. H. AUSTILL.

The facts of this case, as shown by the pleadings and proof, are, that Henry Kruse, a resident citizen of Mobile county, died intestate in July, 1858, leaving a widow and two infant children, his only next of kin, composing his family. At the time of his death, he had some household and kitchen furniture, three or four cows and calves, a few gardening or farming implements, and one or two skiffs, and the sum of fourteen hundred dollars, which he had deposited with a friend. He owed no debts, and his widow paying his funeral expenses, and the expenses of his last illness, kept possession of the personal property, had the care and custody of the infant children, and maintained them until her marriage with the appellee, Mathias Walter, in 1862. After her marriage, the children remained with her and her husband, were maintained and educated by them, until one of them (Mary) was intermarried with the appellant, in 1870. After his marriage, the defendant, Walter, received in Confederate treasury notes the money the intestate had deposited with his friend. Of this sum, he invested eleven hundred dollars in an interest-bearing bond of the Mobile & Ohio Railroad Company, for one thousand dollars; the remaining three hundred dollars he used for his own purposes. There was no administration on the estate of Kruse, until 1873, when the appellant obtained letters of administration, and filed this bill, for the purpose of compelling the respondents to account for the assets they had received. The respondents answered, and filed cross-bills (making the two children parties), showing the assets they had received, and averring there were no debts outstanding against the estate, and exhibited accounts showing they had expended for the distributees in their support and education, more than their respective shares of the assets, and prayed to set-off the amounts so expended, against such shares. The evidence sustaining the answers and cross-bills, the chancellor rendered a decree dismissing the original bill, which is now assigned as error.

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THOS. H. PRICE, for appellant.—No administration having been taken out prior to Brown's appointment, he was the only lawful representative. The law encourages the settlement of estates through the courts by regular administration, and discourages the irregular outside dealing with assets of the decedents, when each of the parties interested are not *sui juris*. Here the personal representative, after discovering ample assets, is defied because the parties converting it say they have advanced the distributees more than their share, and there are no debts. This interference with the assets, no matter what the motive, made the appellees executors in their own wrong. The administrator had nothing to do with their advancements; and it is against the policy of the law to allow administration to be defeated on that account. It is true, the *distributees*, where there are no debts, can have a distribution without administration; but it does not follow that others intermeddling with the assets can get rid of the demands of the rightful representative by showing no debts, and that they have advanced the distributees as much as they are entitled to. The bill was well filed and the parties held to account. If, after that was had, the assets went to others who were indebted to the defendants, they could protect themselves by appropriate proceedings. The necessity for resort to such proceedings was caused by the fault of defendants, and that should not be visited in the administrator by dismissing his bill. It might be that he knew nothing of the defense, and he is certainly entitled to his account.

RAPHAEL SEMMES, *contra*.—Brown comes into a court of equity asking equity, and he must do equity. He applied for administration fifteen years after the intestate's death, and having married the intestate's daughter, it is reasonable to believe he knew the facts with regard to his estate, and how his wife had been treated with regard to it. His application for administration was for the purpose of filing a speculative bill. The appellees have done more for the distributees than the law required. What would be the use or equity of a proceeding to compel Walter to account and pay over the value of the assets to the administrator, whose duty it would be to distribute them to persons who clearly owed appellees, for their support, more than the amount they would be entitled to receive? This estate was small; it has been used in the way the law and a regular administration would have devoted it, and it is not the policy or spirit of our laws to encourage useless litigation with respect to it. The complainant's case shows that he asked a court of equity

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to compel appellees to do a "vain thing," and the court below rightly refused its aid for such a purpose.

BRICKELL, C. J.—The theory of the original bill is, that the respondents having, without authority of law, without a grant of administration from the proper tribunal, intermeddled with, and converted the assets of the intestate, are liable to account therefor to him, as the rightful representative. There is no aspect of the case, in which Mrs. Walter could be charged as an *executor de son tort*. The only intermeddling with the assets in which she participated, before or after her marriage, was with the cattle, the household and kitchen furniture, and the gardening or farming implements. These were exempt from administration, and she was entitled to their possession, as against a rightful representative, or all who could not show a title paramount to that of the intestate.—R. C. §§ 2061–63. The infant children, on separating from the family, were entitled to a division, and an equal share with her, of so much of such property as remained *in specie*. This is a right to be asserted by them, and not by the personal representative of the intestate. In reference to this property, she could not be guilty of a wrongful intermeddling, or conversion, which would render her an *executor de son tort*. To constitute such an executor, there must be an usurpation of the authority of the rightful representative.

The case, then, resolves itself into the single inquiry, admitting as it must be admitted, that Walter, by collecting and using the money of the intestate, which was on deposit, became liable as an *executor de son tort*, can he, when sued by the rightful representative, show there are no debts outstanding against the intestate, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied if he had been the rightful representative. While an *executor de son tort* cannot, by his wrongful acts, acquire any benefit, he is protected in all acts, not for his own benefit, which the rightful representative may do; and it may be laid down, as a general rule, that all his lawful acts are good, affording him full protection. He could not at common law, as the rightful representative could, retain for his own debt; but this exception rested on the policy of preventing a race between creditors, to obtain possession of the assets, without taking administration. It would have enabled him to derive an advantage from his own wrongful acts. 4 Bac. Ob. 31–34; 1 Lomax Ex'rs, 177–185. There being no debts, no necessity for a rightful administration, except to make distribution, if the *executor de son tort* has applied the

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assets to the benefit of the distributees, in equity, he should be protected. The rightful administration is an unnecessary and expensive ceremony, from which no good can result.—*Vanderveer v. Alston*, 16 Ala. 494. If the distributees had, in the present case, as they might have done, sought from the defendants an account of the assets, it will not be doubted the defendants could have retained for the advancements made in their maintenance and education. The appellant, there being no creditors, is in equity but a trustee for the distributees. If he received the assets from the respondents, he would be compelled to hand them over to the distributees, and they would be compelled to pay them back to the respondents in reimbursement of the advancements. There is no reason for any such process, which could result in benefit to no one, and would result in loss to the respondents.

The decree of the chancellor is affirmed.

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Certiorari—Consolidation of Suits.

1. *Consolidation of suits; when properly ordered.*—Separate suits before a justice of the peace, between the same parties on promissory notes apparently given in the same transaction, are properly consolidated in the City Court, when brought there by *certiorari* upon a single petition and bond.

2. *Amendment; what properly allowed.*—A complaint may be amended by adding new parties plaintiff, and striking out the names of others, so long as there is not an entire change of parties.

3. *Plea, denying ownership of cause of action; requisites of.*—A plea denying plaintiff's ownership of the cause of action, must be direct and positive; and though in some instances affidavit of its truth may be made on information and belief, the qualification must be made in the affidavit, and not in the plea; if made in the plea, it is insufficient and properly stricken from the files.

APPEAL from City Court of Selma.

Tried before Hon. JONA HARALSON.

The appellants, Berry and Evans, were sued before a justice of the peace, on the same day, in three several suits, on promissory notes made by them on the 30th day of September, 1869, payable respectively on the first day of April, July and October following, "to J. M. Dedman as administrator of Hugh Ferguson." Each of these notes was for \$37.50. In the proceedings before the justice the plaintiffs are stated to be "Thos. C. Ferguson, Emily Ferguson, P. D. Barker, et

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al., heirs of Hugh Ferguson." No defense was made before the justice, who rendered judgment in each case against the defendants. The appellants included all the cases in one petition, and gave but one *certiorari* bond, to take all the cases to the City Court. Neither party having demanded a jury, the case was tried by the court, which, on motion of the plaintiffs, against the objection and exception of defendants, consolidated the suits.

The bill of exceptions recites that the plaintiffs then asked leave of the court to amend the several complaints in the three causes before the justice of the peace, by adding the names of Joseph Ferguson, Gray C. Ferguson, John J. Ferguson, Ann Eliza McCord, wife of Russell McCord, Ella Robertson, wife of Richard M. Robertson, Joanna Barker, wife of P. D. Barker, as parties plaintiff, and to strike out the name of P. D. Barker in said several complaints before the justice," which motion the court allowed, against the objection and exception of the defendants.

"The plaintiffs then asked leave to file an amended complaint in the cause, which motion the court allowed, and said complaint was accordingly filed, and defendants excepted." The amended complaint contained the names of the new parties as plaintiffs, omitting the name of P. D. Barker; averred that the interest of the *femmes covert* constitute part of their separate estate, &c., and that the notes declared on were the property of the plaintiffs.

After this the defendants pleaded non-assumpsit, and a special plea as follows: "The defendants, for answer to said complaint, say that the plaintiffs in this suit are not the owners of the note declared on in said complaint, to the best of his knowledge, information and belief." This plea was sworn to and subscribed by one of the defendants before the clerk of the court, and afterwards, on motion of the plaintiffs, was stricken from the files, on the ground that it was not verified as required by law. The defendants excepted to this action of the court. The court, after hearing the evidence, rendered judgment for the plaintiff, and defendants appealed.

The consolidation of the suit, the allowance of the amendments, and the striking of the plea from the files, are now assigned as error.

SUMTER LEE, for appellants.

MORGAN, LAPSLEY & NELSON, *contra*.

MANNING, J.—1. There was no error in consolidating in

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the City Court, the three separate actions brought before the justice of the peace, and removed thence together by *certiorari* upon a single petition of these appellants, and one bond executed by them, into the City Court. The parties to each of the actions were the same; the notes upon which they were founded are all of the same date; and they appear to have been given in the same transaction.

2. The statute of jeofails authorizes, according to the construction given to it in several cases, the amendment of a complaint by the addition of new parties plaintiff, and the striking out of the names of others, provided there be not an entire change of the parties. There was no error in allowing the amendments made in the present cause.

3. The writing put in as a special plea, that the ownership of the notes was not in the plaintiffs, is, in fact, a mere affidavit, setting forth in the body of it that the allegation therein is true, "to the best of [the] knowledge, information and belief" of affiant, one of the defendants. Such a writing is not a plea. The averments of a plea must be direct and positive. In some instances, when an affidavit of the truth of the averments in a plea must be made, it may be qualified by a statement of the information and belief of the affiant. But such qualification in the plea itself, makes it wholly insufficient. This writing was, therefore, properly disallowed as a plea, and it was correctly ordered that it be taken from the files.

Let the judgment of the City Court be affirmed.

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Trial of Right of Property.

1. *Trial of right of property; proof of outstanding title in stranger; rule as to, extent of*—While it is true that in the statutory action of the trial of the right of property, the claimant will not be permitted to defeat a recovery by the plaintiffs by proving outstanding title in a stranger, this rule extends only to cases where the plaintiff has made out a *prima facie* case, and the claimant has no privity of estate with the person whose title is set up. It does not overturn the statutory rule that the burden of proof is on the plaintiff in execution.

2. *Same; what proper form of issue in.*—The proper issue in this action is, an affirmation on the part of the plaintiff that the property in question is subject to his execution or attachment, and a denial of that fact by the defendant; and unless the plaintiff proves *prima facie*, at least, a title in the defendant, he must fail though the claimant shows no title to the property in question. Lien, right, or even title in the plaintiff, gives no right to condemn the property under the execution or attachment.

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3. *Attachment; what not subject to.*—The interest of the landlord in the crops grown on the rented premises, by reason of his lien for rent and advances, is not such a title or interest as can be levied upon under execution or attachment.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

Allen, West & Co., the appellees, commenced suit against one Hibbler by attachment, which was levied, among other things, on the cotton in controversy; whereupon, the appellant Starnes, made the statutory affidavit and bond to try the right of property.

On the trial, it appeared that Hibbler, who owned part and had rented part of a plantation in Sumter county, had re-rented it to certain negroes for a stated number of bales of cotton, no matter what number were produced on the place; that the negroes were in possession of the premises, cultivating them under the contract of renting above set out, and had received from Hibbler supplies and advances, for which they still owed him. The sheriff levied the attachment sued out by Allen, West & Co. against Hibbler on the crops growing on the place and worked by the negroes under the contract above set out.

Being advised that the levy of the attachment was void, Starnes, who had made advances to Hibbler early in December, 1876, purchased of Hibbler his claims against the negroes on the place, taking a transfer of them to himself and informing the negroes of his purchase, and they turned the cotton over to him in payment of the rent and advances. There was evidence tending to show that Starnes went with the sheriff and was present when the levy was made on the crops, and that he agreed with the sheriff to superintend the gathering and delivery of the cotton. Starnes, however, testified that he never considered himself the bailee of the sheriff, and that he agreed to look after the place only for the purpose of protecting his own interest, and as a matter of friendship to Hibbler and the officer levying the attachment. It also appeared that most of the cotton was in his possession when he purchased the claims of Hibbler against the negroes. Hibbler, the defendant in attachment, testified that he and his brother owned, as tenants in common, the lands on which the cotton levied on was grown; that he had rented his brother's interest for 1876, and relet the place to the negroes on it for a stated number of bales of cotton, looking to his landlord's lien for rent and advances for his protection, and that the only interest he had in the crops was that of landlord, and that the negroes were not employed by him. About the middle of December, one Cobbs, as the attorney of Allen,

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West & Co., bought from the negroes on the place all their interest in the crops levied on, and on the trial he offered in evidence the receipt given by them for the money thus paid. The claimant objected to its introduction on the ground of irrelevancy, but his objection was overruled, and he excepted. Cobbs was introduced as a witness, and testified that after the levy was made, he, in company with a deputy sheriff, went to the plantation and had a conversation with the negroes; that they told him that every thing on the place belonged to Mr. Hibbler, and that they owed him for rent and advances, and that they were not entitled to any thing until he was paid, and that they did not know how they stood with him; that they only claimed to be paid for the work done in gathering the crop for the sheriff, and the balance, if any, due them upon a settlement with Hibbler, and they agreed to accept in full of all their claims the amount shown to have been paid them by the receipt.

Plaintiffs then offered to read in evidence certain letters of Hibbler to Allen, West & Co., which Hibbler testified he had written. These letters were written by Hibbler to Allen, West & Co. in the course of general business, and several of them refer to cotton grown or to be grown on and shipped from the place in Sumter county, Ala. Hibbler testified that in his allusion to this cotton, he only meant that he could control the shipment of it. The letters were objected to, the objections overruled and claimant excepted. This was, in substance, all the evidence. The court, of its own motion, then charged the jury as follows: "The plaintiff sued out the attachment against Hibbler, and among other things levied on the cotton in question as Hibbler's. The claimant, Starnes, comes forward and interposes a claim to the cotton, alleging that it is his. To this allegation of Starnes, the plaintiffs say that the cotton levied on was the property of Hibbler and liable to the attachment, and hence was not the property of Starnes. This is the issue we are trying." This charge was excepted to by the claimant. The court further charged the jury, that "if the negroes, when the sheriff levied the attachment, admitted that the cotton belonged to Hibbler and surrendered the cotton to the sheriff as his property, who thereupon took possession and control of it, they (the negroes) are estopped to deny the title of Hibbler, or to claim the cotton against the plaintiffs or the officer who was acting under the process." This part of the charge is marked "5," and was excepted to by the claimant.

The court further charged the jury, that "if the persons who cultivated the lands and produced the cotton, and who had the possession of it, represented to the officer, or the plain-

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tiff's agent, that the cotton was the property of Hibbler, in which they had an interest, and they made such representations with the knowledge of the facts, and with the intention that the person to whom they were made should act upon them, and such person was influenced by them and acted upon them, and the levy was made under these circumstances, then the persons who made such representations are estopped from setting up any claim to any part of said cotton; and if you find they have been paid for such interest in accordance with any agreement made with them at the time of the levy, then they were thereafter and are now estopped from setting up any such claim. Under this state of facts, if you find them so, the negroes would be estopped from contradicting their admissions or setting up in themselves a title to the cotton, which existed, if at all, previous to the surrender to the sheriff. If you find the negroes are estopped, and you find that Starnes, the claimant, afterwards derived and claims title from and under the negroes, then he is also bound by the same estoppel, and he can not now set up title in himself; and unless he can set up title in himself, your verdict must be for the plaintiffs. To this charge (numbered 6) claimant excepted.

The claimant then requested the court in writing to give the following charges:

"1. The plaintiffs in this cause can condemn the cotton levied on, only on the ground that it belonged to Hibbler at the time of the levy; therefore, if the jury believe, from the evidence, that the cotton belonged to other persons at the time of the levy, and the plaintiffs afterwards purchased the same from such other persons, then the plaintiffs can not in this case, rely on or be entitled to a verdict by reason of any title thus gained.

"2. The right of the plaintiffs in this action, if under the evidence they have any, is to condemn said cotton as the property of Hibbler, and no title acquired by them from any other person subsequent to the levy, can be looked to by the jury in determining whether plaintiffs are entitled to a verdict or not. Each of these charges the court refused, and the claimant separately excepted. The various rulings of the court, to which exceptions were reserved, are now assigned as error.

BARRY & BRAME, COOKE & LITTLE, and WATTS & SONS, for appellant.—A trial of the right of property is an action or suit in which the plaintiff in execution is the actor and the claimant is defendant.—5 Ala. 531; 11 Ala. 434; 34 Ala. 478. Hibbler's interest in the property was that of a landlord

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holding a lien for rent and advances. Such interest is not subject to attachment.—8 Ala. 73; 2 Ala. 808; 35 Ala. 668; 52 Ala. 123. The admission of the evidence of the purchase from the negroes, was clearly inadmissible. The title, if any, acquired by this purchase, was subsequent to the levy, and the sole question to be tried was, whether the cotton, at the time of the levy, was the property of Hibbler, and as such subject to the attachment. The charges of the court ignore this plain proposition, and assert in broad terms that a title acquired from third persons, subsequent to the levy, can be made the basis of a recovery in this action. This was clearly erroneous.

D. P. BESTOR, *contra*.—The letters of Hibbler to Allen, West & Co. were properly admitted. Starnes claimed through a pretended sale from Hibbler, of his claims against the negroes, and his admissions were properly evidence against Starnes. The issue is correctly stated in the charge of the court. The court had a discretion in directing the form of the issue.—5 Ala. 770. The statements of the negroes estopped them from setting up any claim to the cotton, and Starnes, who had no other claim except what he acquired from the negroes, after they had asserted to the sheriff that all the cotton belonged to Hibbler, except the claim which they subsequently sold to plaintiffs, certainly had no title at all; and hence he could not recover, and the issue must necessarily be for the plaintiffs.—1 Brick. Dig. 480, § 67; 2 Brick. Dig. 402, §§ 10, 14, 16.

STONE, J.—It is true that in a trial of right of property, under the statute, the claimant can not defeat plaintiff's recovery by proving outstanding title in a stranger.—*Foster v. Smith*, 16 Ala. 192; 2 Brick. Dig. 480, § 67. This principle, however, hath this extent: When plaintiff in execution makes out a *prima facie* case, the claimant will not be allowed to overturn it by proving title in a stranger, with whose title he does not connect himself by privity of estate. It does not overturn the statutory rule, that "the burthen of proof is on the plaintiff in execution."—Code of 1876, § 3343. It has long been settled in this State, that in trials of right of property, a statutory suit which has been classed as *sui generis*, the proper issue is "an affirmation on the part of the plaintiff that the property in question is subject to his execution, and a denial of that fact by the defendant."—Code of 1876, § 3342; 2 Brick. Dig. 478–9, §§ 48, 49, 51, 52. See, also, *McAdams v. Beard & Henderson*, 34 Ala. 478, 481.

The form, and only proper form, to be observed in framing

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the issue, requires the plaintiff in execution "to allege that the property levied on is the property of the defendant in execution [or attachment], and liable to its satisfaction."—Code of 1876, §§ 3342, 3290. The leading, fundamental fact is, that the property seized belongs to the defendant, by a title which renders it liable to levy and sale under the process. Possession in the defendant is *prima facie* evidence of such ownership, and in the absence of other proof, would require a condemnation of the property. In just such case as this, that other principle comes in, namely: that plaintiff, having thus shown a *prima facie* case of liability, the claimant will not be permitted to rebut that *prima facie* case by proving title in a stranger. But, until the plaintiff in execution proves title in the defendant, or makes proof of such *prima facie* title, it is immaterial whether claimant has title or not. The plaintiff must fail, not because claimant has shown a title in himself, but because plaintiff has failed to prove the essential, indispensable fact of such ownership in the defendant, as renders the property liable for the satisfaction of the debt; and that ownership or title must be such that, under our statutes, it is subject to seizure and sale under execution against such defendant in execution. The levy and averment of liability assert two propositions: that defendant in execution is indebted to the plaintiff, and that the goods seized are the property of the defendant, and as such liable to the payment of his debt. Lien, right, or even title to the goods, in plaintiff, not only does not strengthen his right to condemn them under execution or attachment, but their tendency is in the opposite direction.—See *Boswell v. Carlisle*, at December term, 1876; *Dent v. Smith*, 15 Ala. 286; *Powell v. Williams*, 14 Ala. 476; *Barker v. Bell*, 37 Ala. 354.

The testimony of Talbot Hibbler, if believed, tends to show that his claim to the cotton, and only claim, consisted in a landlord's lien for rent and for advances. This is not such a title or interest as can be levied upon under execution or attachment. It gave to Hibbler no right to take possession of the crop, without delivery by or permission from the tenants.—*Folmar & Sons v. Copeland & Brantley*, at the present term. The tenants were only debtors to Hibbler, and the latter had but a lien on the crop for the security of his claim, if his version of the transaction be the true one.

Under the rules above laid down, there are many rulings in this record which must work its reversal. The following evidence was improperly admitted: First, the written memorandum of sale made by the tenants to Allen, West & Co.,

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dated 21st December, 1876; second, the letters from Talbot Hibbler to Allen, West & Co.

As to the charge of the court, there is no question of estoppel that affects the issue in this cause. The statement of the issue before the jury, found in the first paragraph of the general charge, does not sufficiently show that the onus was on the plaintiff to make out his case. Charges numbered 5 and 6, of the general series, should not have been given. Charges Nos. 2 and 3, of those requested by plaintiff, are not in harmony with the principles laid down above, and the court erred in giving them. The two charges asked by claimant should have been given. Each asserts a correct legal principle.

Reversed and remanded.

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Garnishment.

1. *Garnishment; what debt will reach.*—The maker of a negotiable promissory note who, before its maturity, is garnished by a creditor of the payee, and after it matures takes the note up, giving the payee another negotiable note in extension of the debt, can not thereby affect the rights of the garnishing creditor; and the first note being owned and held by the payee at maturity, judgment in favor of the garnishing creditor is properly rendered against the maker, although the renewal note has not matured and the maker does not know who owns it.

APPEAL from Mobile Circuit Court.

Tried before Hon. H. T. TOULMIN.

The appellees, Merrill, Fitch & Allen, recovered judgment against Albert J. Leslie for the sum of \$1,379, on the 19th day of December, 1876. On the 9th day of January following, C. W. Leslie was summoned by garnishment to answer what he was indebted to said Albert.

C. W. Leslie appeared, on the 15th day of February, 1877; and filed a written answer, stating that "prior to the service of the garnishment" he had purchased a stock of jewelry from said Albert, for which he paid no part in cash, but executed and delivered therefor his seven promissory notes for the sum of \$968.62 each, due respectively, April 22d, 1877; May 22d, 1877; November 22d, 1877, December, 22d, 1877; January 22d, 1878; March 22d, 1878; May 22d, 1878; and one note for \$2,260, on the 22d day of May, 1878; that said promissory notes are negotiable and payable at the Mobile

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Savings Bank to the order of the defendant," and that he was not otherwise indebted, &c.

On June 13, 1877, the garnishee, in obedience to the order of the court, appeared and answered orally. In this answer he stated, among other things, that he had not paid the two notes which had matured, but they had been extended, and the first notes maturing taken up, by giving said Albert other notes, payable twelve months afterwards. All these notes were negotiable and payable in bank. "I do not know who holds these notes, or whether A. J. Leslie will hold them when they mature." Afterwards, the garnishee amended his oral answer, by stating that he does not now know who is the holder of the two notes which he renewed, and did not know at the time of making his oral answer. After this, and on the 28th day of June, 1878, the court rendered judgment against the garnishee for the amount of the judgment, it being a sum less than the amount of the two notes first maturing when the garnishment was served on C. W. Leslie, and he excepted.

This ruling is now assigned as error.

BOYLES & OVERALL, for appellant.—A debtor can not know certainly in whose hands his obligation may be when it matures, and his admission that it is outstanding, can not be effectual as an admission of indebtedness to the original holder, of such a character as to be a continuing liability in his hands.—*Littlefield v. Hodge*, 6 Mich. 327. The obligation of the debtor in a case like this is not to pay to any particular person, "but to the holder at maturity, whoever he may be."—14 Louisiana, 449. No court can consistently sustain the attachment of negotiable paper while still current, "without claiming for its judgment conclusive effect against all the world." There is nothing to prevent A. J. Leslie from transferring the notes after the garnishment served on his debtor. What is to prevent the debtor from having to pay again when the holder of the paper makes demand? He is the owner of the debt, and not concluded by a judgment to which he is not a party. The current of authority in this country is against the condemnation of a debt which has assumed the form of a negotiable note, unless the known owner of the debt is before the court.—16 Vermont, 131; 11 Iredell, 567; Drake on Attachment, § 585; 4 Dallas, 62; 2 Bailey, 441; *Winston v. Westfelt*, 22 Ala. See, also, *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Bartley*, 14 Id. 318; *Brown v. Davis*, 3 Term, 86; *Hinton's Case*, 2 Show. 247; *Anon.* 1 Salk. 126; *Miller v. Race*, 1 Burr. 462; *Grant v. Vaughan*, 3 Id. 15, 16; *Peacock v. Rhodes*, 2 Doug. 633; *Lawson v. Weston*,

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4 Eq. R. 56; *Worcester Bank v. Dorchester Bank*, 10 Cush. 491; *Smith v. Sac County*, 11 Wall. 146; *Collins v. Martin*, 1 Bos. & Pull. 648; *Bank v. Hoge*, 35 N. Y. 68; *Phelan v. Moss*, 67 Penn. 63; *Raphael v. Bank*, 17 C. B. 171; *Lake v. Reed*, 29 Ia. 359; *Gage v. Sharp*, 24 Id. 15; *Ranger v. Cary*, 1 Met. 373; *Harvey v. Towers*, 6 Hurls. & Gord. 660; *Percival v. Frampton*, 2 Crompt. Mees. & Ros. 183; *Seybel v. Bank*, 54 N. Y. 291; *Tucker v. Morrill*, 1 Allen, 528; *Maither v. Maidstone*, 1 C. B. N. S. 287; *Sistermans v. Field*, 9 Gray, 337; *Brush v. Scribner*, 11 Conn. 390; *Swift v. Tyson*, 16 Pet. 15.

C. H. LINDREY, *contra*.—By the giving of the notes, no matter what their form, appellant would become indebted to Albert Leslie, in the future, unless the latter transferred the paper, and Albert Leslie is the legal owner of the debt until the contrary is shown.—27 Ala. 617. If the original payee holds them, the maker can not complain of a judgment condemning them. If, on the other hand, some *bona fide* endorsee held them, and appellant takes no steps to ascertain who such holder is, and to set up his claim, it is his own fault and he must take the consequences.—34 Ala. 583. The garnishment gave the judgment creditor a lien on the debtor, which could not be impaired by any after contract between the debtor and the garnishee.—5 Ala. 231. The legal conclusion, from the fact that A. J. Leslie bought up the first notes, and took others in place of them, is, that he was then the owner of the debt, and the garnishment having been served, it was the garnishee's duty to act accordingly.

While the original payee remains the owner of the note, the mere fact of their negotiability does not take them beyond reach by garnishment.—7 Yerger, 42; 3 Mo. 88; 3 Conn. 27; 1 Harris & Johnson, 536; 21 Ala. 576; 21 Ala. 576; Drake on Attachments, § 587.

STONE, J.—The two notes, first maturing, disclosed in the answer of the garnishee, were past due at the time he filed his amended answer, and he fails to disclose that he had received any notice of the transfer of the notes, or that any person, other than the defendant debtor, asserted any claim to them. The sum of the two notes, so past due, exceeds the amount of the judgment, for the payment of which they are sought to be condemned. The renewal of the notes by the garnishee, made after the maturity of the first notes, and after he had been served with summons in garnishment, can not affect the rights of the attaching creditor. The liabilities of the garnishee are the same as if he had never given the

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renewed notes.—*M. & O. R. R. Co. v. Whitney*, 39 Ala. 468; *Mills v. Stewart*, 12 Ala. 90.

The present debt, although in form a commercial security, was owned and held by the payee after its maturity; for, after that time, he allowed his debtor to renew it. The debt was subject to garnishment, (*Mills v. Stewart, supra*), and there was no error in its condemnation.

Affirmed.

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Bill in Equity to enforce Vendor's Lien.

1. *Heir, title of; when divested.*—The title of the heir or devisee to lands devised or descended, and sold under order of the probate court for cash, is not divested until the purchase-money has been paid, the sale reported to and confirmed by the court, and a conveyance executed to the purchaser under its order.

2. *Sale by administrator, in violation of order of court.*—Where an administrator violates the order of the probate court in making a sale of decedent's lands, and sells on a credit instead of for cash, the sale is in excess of his authority, and depends for its validity on the subsequent ratification of the heirs or devisees, or in a proper case, its confirmation by the Court of Chancery.

Same; parties to suit to enforce sale.—Where an administrator files his bill to enforce a vendor's lien on lands of the decedent, sold by him, under order of the court, whether the sale be made pursuant to or in excess of the authority conferred—the sale not having been confirmed, and no conveyance having been made to the purchaser—the heirs and devisees must be made parties; and where the estate has been declared insolvent, creditors, whose claims have been filed and allowed, are also necessary parties.

4. *Defect of parties, objection for; what may be raised for first time in appellate court.*—The omission of an indispensable party will cause a reversal on error, though the objection was not raised in the court below.

5. *Want of authority of administrator to make sale; who can not deny.*—One who enters and remains in possession of land under a sale by the administrator, cannot be heard to deny his authority to make it, and thus defeat payment of the purchase-money; but may, if the sale was in excess of his authority, on proper proceedings, compel creditors and heirs to elect its ratification and confirmation or rescission.

APPEAL from Chancery Court of Perry.

Heard before HON. CHARLES TURNER.

The appellee, John H. Chapman, as administrator *de bonis non* of one J. G. Cole, deceased, filed this bill against the appellant McCully, and one Mathews. The bill alleged that Cole died testate in Perry county, seized and possessed of certain lands. His will was duly admitted to probate, and the persons named in it as executors, qualified, but one of

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them resigned, after making final settlement with the probate court, and the other afterwards had the estate declared insolvent, settled her administration, and resigned. Appellee was appointed administrator *de bonis non*, and took possession of the lands in controversy. The probate court made an order of sale, and Chapman exposed the lands for sale in accordance therewith, Mrs. McCully becoming the purchaser for the sum of \$7.50 per acre, or \$6,900 for the tract of land. The order required the sale to be made for cash. Mrs. McCully was unable to comply, but requested Chapman to let her have possession so that she could cultivate the lands the ensuing year, and indulge her in the payment of the purchase-money until December of the next year. Chapman consulted with the creditors, and they agreed to let Mrs. McCully remain in possession, provided she would pay \$1.50 per acre, in addition to the purchase-money, for the rent of the land that year. Mrs. McCully thereon assented to the arrangement, and gave the administrator her promissory note for the purchase-money, and the amount charged as rent, payable December 1st, 1871. Mrs. McCully entered into possession and still retains it, having made some payments on the note; but no deed has been made to her. The bill alleged that Matthews claimed some interest in the lands, asserts that the complainant has a vendor's lien on the lands, and prays that they may be sold for the payment of the balance due on the note.

Mrs. McCully demurred to the bill, assigning as grounds: 1st, that the sale was not made in accordance with the order of the probate court, and that the sale and note given for the purchase-money are void; 2d, that the bill seeks to enforce a private sale of lands made by the administrator in violation of law; 3d, that it appears complainant has and can convey defendant no title if payment of the purchase-money is enforced; 4th, because complainant has no lien. She also demurred to so much of the bill as sought relief on the amount of the \$1.50 per acre rent, on the ground that it was a device to exact usury, for forbearance on the debt created by her bid.

This demurrer was overruled. She afterwards demurred on the ground that the sale was never reported to or confirmed by the probate court, but no action seems to have been taken on this demurrer. A decree *pro confesso* was taken against Matthews. Mrs. McCully's answer admitted the main allegations of the bill, but denied that complainant was entitled to relief, setting up some outside matters about the reason of her failure to get some money due her, with which she expected to pay the amount of her bid, and

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averred that the rent per acre she agreed to pay was really for forbearance on the debt, and not for rent, as the lands were not worth that rent. The testimony, however, shows that she was mistaken in this, and that the arrangement which she made about rent was not a usurious device, but a condition imposed by the creditors, whom the administrator consulted about allowing her to take the lands and postpone payment for a year, who were anxious as well as she not to have a resale, and at the same time not to lose rent for the year. The will of Cole is not made part of the pleadings or evidence.

The Chancellor decreed that complainant had a lien on the lands for the amount of the purchase-money and interest thereon, and directed a sale of the lands to enforce the lien. The overruling of the demurrer and the decree rendered are now assigned for error.

JOHN F. VARY, for appellant.—Chapman had no title, and could convey none. The probate court never confirmed the sale. The order of sale was for *cash*, the sale made was on a *credit*. It was in plain violation of the statute, a flagrant violation of duty, and no rights could arise under it. The administrator and creditors could not confirm the sale—that power was vested in the court alone. The order of the court of chancery was in effect a confirmation of that *void* sale at the instance of the administrator, without giving the heirs a hearing. Has not the probate court the exclusive right of confirming a sale, when the administration is still in that court?

D. S. TROY, *contra*.—Mrs. McCully is in possession under the contract, and she can not keep the land and at the same time avoid the sale.—7 Ala. 170; 9 Ala. 297. The case is, therefore, one of a sale of lands, the vendee in possession; and in such a case, as between vendor and vendees, it matters not where the title is. As to the heirs being parties, it is suggested that the parties might litigate their rights between themselves, and after doing so, ought not to be permitted to complain that others, whom they could have brought in, were not made parties. As between vendor and vendee, it matters not what title passed by the sale, so the vendee got what was bargained for.—32 Ala. 288. Chapman is chargeable with the amount of Mrs. McCully's notes, and he ought certainly to be allowed to enforce her notes against the lands.

BRICKELL, C. J.—The general rule in a court of equity

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is, that all persons having an interest in the subject matter of the suit, must be made parties, either as plaintiffs, or as defendants. The purpose of the court, is, the prevention of future litigation, and security in the performance of its decrees. There may be a separation of the legal and equitable title, and if there is, the court will not generally proceed to a decree, unless the persons in whom each resides, are made parties, so as to bind them by the decree which may be rendered. If the legal title was not affected, the persons in whom it resides, could, notwithstanding the decree, proceed at law to assert it, and the decree, being as to them *res inter alias actae*, would be no answer, and would not afford security in its performance.—1 Dan. Ch. Pr. 240-243.

The title to the lands, which are the subject of this suit—title for which the appellant contracted, and which the appellee contracted to sell, if they were not devised by Jerre G. Cole, descended to his heirs, or if devised, passed to the devisees, *eo instanti* his death. This title was not divested by the decree of the court of probate, authorizing the appellee to make sale of them, nor would it have been divested if a sale had been made in strict conformity with that decree. The purchase-money must have been fully paid, the payment reported to the court of probate, and a conveyance executed to the purchaser under a decree of the court, to divest the title passing to the heirs by descent, or to the devisees, if devised. Until the execution of the conveyance, the heirs, or devisees, may maintain ejectment against the purchaser, or whoever enters under him.—*Doe v. Hardy*, 52 Ala. 297. The court should not, therefore, in the absence of the heirs, if the lands descended, or in the absence of the devisees, if they were devised, render a decree for their sale. The purchaser could acquire, at most, but an equitable title, which would not avail at law, and for protection against the legal title, he would be compelled to resort to another suit in equity. This would be true if the sale had been made in conformity with the decree of the court of probate. The sale was not made in conformity with that decree, but was matter of contract with the administrator, made without authority, and is dependent wholly for its validity, and for its operation, on its ratification by the heirs, or the devisees, or on its confirmation by the court of chancery, because the price paid, or contracted to be paid, is adequate, and has been, or shall be, under the direction of the court, applied to the satisfaction of the debts chargeable on the lands. The order of the court of probate required a sale for cash, and was the limit for the authority of the administrator. A sale on credit was without his authority, and if reported to the

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court of probate, would not have been capable of confirmation. We repeat, therefore, the sale made depends for its validity on its ratification by the heirs or devisees, or its confirmation by the court of chancery. There is no averment of ratification, and in the absence of the heirs, or devisees, there could be no confirmation. The bill does not show whether the land were devised, or whether they descended to the heirs of Jerre G. Cole. We hold, the devisees, if the lands were devised, or the heirs, if they descended, are indispensable parties, without whom no decree can be rendered, which can be safely performed, or which will finally quiet litigation. While the general rule is, the want of parties should be insisted on by demurrer, or in the answer; yet, the rule in this State has been to restrict the application of the general rule, to formal parties. The omission of an indispensable party is a defect that will reverse the decree on error, though objection has not been made in the court of chancery.—*Batre v. Auge*, 5 Ala. 173; *McMaken v. McMaken*, 18 Ala. 576. We think the creditors, who have filed their claims in the court of probate, in the course of the insolvency proceeding, and had them allowed, thus becoming entitled to share the purchase-money, if the sale to the appellant is confirmed, should be made parties either as plaintiffs or defendants. The lands are chargeable with the payment of their claims, and they have an immediate interest in the sale—the right to show that its confirmation would be unjust to them, because of the inadequacy of the price, or from any other cause.

The sale made under the decree of the court of probate, at which the appellant bid off the lands, if the purchase-money had been paid, in accordance with its terms, was inchoate until confirmed by the court. The purchase-money not having been paid, no report of the sale having been made, and no confirmation by the court, it conferred on the appellant no right or interest in the lands.—*Hutton v. Williams*, 35 Ala. 503. The strict line of duty and authority of the appellee, was to report the failure of the appellant to comply with the terms of sale, obtain an order of resale, holding the appellant responsible for the differences, if any, in the price obtained on such resale. This course was not pursued, each party being anxious to avoid a resale. A contract was made, by which appellant was to be let into possession, and at the expiration of twelve months, was to pay the sum at which she had bid off the lands, and a stipulated rent for the current year. Under this contract, appellant executed to the appellee her promissory note for the aggregate of the rent, and the sum bid; entered into and remained in undisturbed

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possession, having made partial payments on the note. It is certainly true the appellee was without authority to make this contract, and that it is without validity, if not ratified by the heirs or devisees, and the creditors; or confirmed by the court of chancery. Having entered into possession under the contract, and remaining in possession, the appellant can not be heard to deny the authority of the appellee to make the sale. She is enjoying the benefits of the contract, and can not escape from its obligations. If she desires to perfect her title, or to rescind the contract, because of appellant's want of authority to make the sale, she can, doubtless, compel the creditors, and heirs, or devisees, to elect its ratification and confirmation, or its rescission. It is not within her power to rescind it, without affording them the opportunity of ratifying it, and passing to her the title for which she contracted.—*Lamkin v. Reese*, 7 Ala. 170; *Bland v. Bowie*, 53 Ala. 152.

It is true that, under our statutes, it has been uniformly held, that administrators or executors, not having power under a will, can not, without an order of the court of probate, make sale of the personal property coming to their possession, or control, for administration; and that a sale made without an order of court, is void, passing no title to the purchaser, and that the executor, or administrator, can not coerce the payment of the purchase money. At common law, the power of the personal representative, to dispose of the personal assets, was unlimited. The decisions to which we have referred, rest upon the ground, that as to personal property, the subject of transfer by sale,—personal property, other than choses in action—the statutes have taken away the common law power of disposition, and prohibited sales, except under an order of the court of probate. A sale not made under such an order, is something more than an excess of authority; it is a violation of express statutory prohibition, and consequently void. The contract between these parties is not tainted with illegality—it is but an excess of the authority with which the appellee is clothed. If the parties in interest elect its ratification, or it shall be confirmed by the court of chancery, the appellant can acquire title without the violation of any statutory inhibition.

We can not perceive that the contract has in it any element of usury. It was a simple contract of sale. There was no forbearance of a *debt*, for none existed. The prior sale was inchoate, and was never completed, so as to render the appellant liable for the price bid—her only liability was for a failure to comply with the terms of sale. The measure of that liability, was the difference between the sum bid, and

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the price obtained on a resale. No resale having been made, there could be no liability for more than nominal damages. The theory urged by the appellant, that the sum agreed to be paid for rent of the current year, was a device to obtain more than legal interest for the forbearance of the debt incurred by the bidding off the lands, at the public sale, can not be sustained. No such debt was incurred; and whatever may have been the expressions of the parties, the legal effect of the contract, is that of sale and of renting; not of the payment of rent, as interest for forbearance in the payment of the purchase-money.

For the defect, in the want of proper parties, the decree must be reversed, and the cause remanded.

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Action for Breach of Agreement.

1. *Signature; what evidence inadmissible to prove.*—Where the issue is, whether a telegram is in the hand-writing of a particular person, his genuine signature to another instrument cannot be admitted, to enable the jury, by a comparison of the two, to determine by whom the telegram was written; but where suit is on a promise or request sent by telegraph, and its execution is not denied by sworn plea, proof of the genuineness of the telegram is without the issue, and allowing comparison of hand-writing could not work injury, and is not ground for reversal.

2. *Bail bond; indemnity for liability on; to what extends.*—P.'s son was arrested on a criminal charge; plaintiff signed the son's bail bond, receiving certain jewelry as indemnity, agreeing to return it as soon as P. authorized plaintiff to go on the bond. Upon execution of the bail bond the son was released from custody. The next day P. telegraphed plaintiff, "My son is arrested in your town. Go surety for his appearance, and I will save you harmless." On receipt of the telegram, plaintiff restored the jewelry to the son, who afterwards continued at large under the bond already executed. The son, not having appeared, a conditional judgment was rendered against the obligors on the bond. Afterwards, by consent of court, the solicitor agreed to discontinue proceeding on the bond, if plaintiff would confess "judgment for costs as upon conviction," and afterwards a *nolle pros.* was entered, by consent of court, as to the criminal charge, "upon payment of costs of the prosecution, as if upon conviction," and plaintiff thereupon confessed judgment, which was rendered against him accordingly. Plaintiff then brought suit against P.'s administrator to recover the amount plaintiff was compelled to pay on the judgment. *Held,*

1. This is not a case of a mere naked promise to indemnify the plaintiff against a liability previously incurred for a third person without request; but a promise, founded on a consideration which was executory and continuous in its nature, to-wit: not only taking the son out of jail, but keeping him out.

2. Although no new bond was executed *after* the telegram was received, yet the plaintiff having, at any time afterwards, the right to surrender the son, and not having done so, had fully complied with all that was of substance in

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the father's request, to the benefit of the father and son, and could maintain an action against the father to recover the damage which the plaintiff had sustained.

3. The substance and spirit of the request were such as authorized plaintiff, under the circumstances, after proceedings to forfeit the bond on account of the son's non-appearance, to confess judgment for costs, as upon conviction, upon judgment of *nolle pros.* entered by consent of court upon these terms, and the indemnity promised, extends to the damages which the surety thereby sustained.

APPEAL from Circuit Court of Mobile.

Tried before Hon. H. T. TOULMIN.

Appellee, Roberts, brought this action against the appellant, Bestor, as the administrator of one J. D. Powers, deceased. The complaint contained two counts: the first count claimed of the appellant, as administrator, the sum of two hundred dollars, the amount which Roberts had been compelled to expend by reason of becoming surety on the bail bond of one J. M. Powers, at the instance and request of appellant's intestate, who promised to indemnify him against all loss, by reason of his going on the bond, which he failed to do. The second count claims of the appellant, as administrator, &c., two hundred dollars for the breach of an agreement in writing, entered into by Joseph D. Powers, deceased, in his life time, with plaintiff, in substance as follows: "My son is arrested in your town. Go surety for his appearance, and I will save you harmless;" avers a compliance on the part of Roberts, and a refusal by the administrator, to comply with its provisions. The case was tried on pleas of the general issue and want of consideration. The evidence shows the following state of facts: J. M. Powers, the son of appellant's intestate, being under arrest on a criminal charge, in Birmingham, applied to Roberts to become bail for him, which Roberts consented to do temporarily, until he could communicate with his father, taking from him, as security, certain jewelry, which he agreed to return, when his father should authorize Roberts to become surety for him. On the next day Roberts received the telegram declared on, and returned the jewelry, remaining on the bond. Powers failing to appear, a conditional judgment was rendered against his sureties. Afterwards, by consent of court, the solicitor agreed to discontinue proceedings on the bond, if Roberts would confess "judgment for costs, as upon conviction," and afterwards a *nolle pros.* was entered, by consent of court, as to the criminal charge, upon judgment for the costs of the prosecution, as if upon conviction," and Roberts thereupon confessed judgment, which was rendered against him accordingly. This suit was brought to recover the amount Roberts was compelled to pay on this judgment.

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Plaintiff introduced, as a witness, one Sanford, who testified that he was the manager of the Western Union Telegraph Company, at Mobile, and that, at the request of plaintiff's attorney, he had searched the files of his office and found a telegram similar to the one declared on, which purported to be signed by J. D. Powers. The plaintiff, for the purpose of proving the signature of J. D. Powers to the telegram, introduced in evidence a bond signed by him, after due proof of its execution, for the purpose, as stated by counsel, of allowing the jury to compare the signatures. The admission of this evidence was objected and excepted to by the defendant.

DAN. H. LAY, and D. P. BESTOR, for appellant.

STEWART & PILLANS, *contra*.

STONE, J.—Each of the counts in the present complaint contains a substantial cause of action. In the second count the telegram of plaintiff's intestate is declared on as the foundation of the suit. It is averred in said second count, "that the plaintiff claims of the defendant, said administrator, two hundred dollars, for the breach of an agreement in writing, entered into by Joseph D. Powers, in his life time, with plaintiff, in substance as follows," giving what purports to be a copy of the telegram. There was no sworn plea denying the execution of this instrument. Under this state of the pleading, the telegram, without further proof, was "evidence . . . that the party undertook to perform the duty for which it was given, and that it was made on sufficient consideration."—Code of 1876, §§ 3035, 2989. Hence, it was not necessary, under the pleadings, to prove the execution by intestate of the alleged telegram; and it follows that the proof, by comparison of hand writing, was immaterial—related to no issue in the cause, and could not possibly have done any injury.

On the subject of comparison of hand-writing, see *Kirksey v. Kirksey*, 41 Ala. 626; *Little v. Beasley*, 2 Ala. 703; *Bishop v. The State*, 30 Ala. 41; *Durkee v. Verm. Cen. R. R. Co.* 29 Verm. 127.

If the present case be no more than a promise by intestate to indemnify plaintiff against a liability previously incurred for a third person, without prior request, it presents the naked case of past consideration, is *nudum pactum*, and can not be the basis of a recovery.—*Jackson v. Jackson*, 7 Ala. 791; *Rulledge v. Townsend*, 38 Ala. 706; 22 N. H. 544, (*Allen v. Woodward*); *Buckley v. Landon*, 2 Com. 404; *Tharm v.*

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Dear, 4 Johns. 84; *Ellison v. Jackson Water Co.* 12 Cal. 542; *Freer v. Hardenbergh*, 5 Johns. 272; *Mills v. Wyman*, 3 Pick. 207; *Cook v. Bradley*, 7 Com. 57.

In 3 Salk. 96, it is said, "A promise grounded on a consideration executory, or which continues, is good, though the consideration was without request; as, for instance, 'For that you married my daughter, I promise to give you £100; good.'"

In *Marsh v. Kavenford*, Cro. Eliz. 59, the action was assumpsit, and the counts were, "that whereas, at the request of the defendant, there was a communication of a marriage between the plaintiff and the daughter of the defendant; that he married her, and that afterwards the defendant promised to pay him one hundred pounds. Egerton and Foster argued that this was no consideration; for it is past, and had no reference to any act before; but if the marriage had been at the request of the defendant, and after the marriage he promised, &c., this had been good.—Popham, Daniel and Coke, *contra*. . . . and it was here adjudged for the plaintiff."

In *Loomis v. Newhall*, 15 Pick. 159, it was ruled that "an entire promise, founded partly on a past and executed consideration, and partly on an executory consideration, is supported by the executory consideration."

So in *Barker v. Halifax*, Cro. Eliz. 741, the court said, "that an assumpsit in consideration that you had married my daughter, to give unto you £40 was good; for the affection and consideration always continues."

In Sto. Contr. § 477, this doctrine, in substance, is quoted without dissent.

In the present record, the service shown to have been rendered by Roberts to the son of defendant's intestate, was continuous in its character. He, as bail of young Powers, could, at any time, have arrested his principal, and surrendered him to prison in discharge of his bond. The object and spirit of the elder Powers' telegraphic request were, not only that his son should be taken out of prison, but kept out. Roberts complied with all that was of substance in his request; conferred on father and son benefit equal to all he could have done, if he had, technically, signed his bail bond after he received the telegram. We think Mr. Powers' promise, if proved to have been made as alleged, creates a legal obligation of indemnity, and will support an action.

There is nothing in the other question raised.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

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Bowles v. The State.*Indictment for Murder.*

1. *Flight, and attempts to evade justice, proof of; relevancy and effect of.* All evasions or attempts to evade justice by a person suspected or charged with crime, are circumstances from which guilt may be inferred, if connected with other criminating facts; and though not of themselves warranting a conviction, they are relevant evidence, it being the province of the jury, to determine their weight, in view of all the facts and circumstances of the case, under appropriate instructions from the court.

Same.—Flight, for which no proper motive can be assigned, and remaining unexplained, is a circumstance proper to be submitted to the jury, in connection with other criminating evidence against the accused; and where he fled after the commission of the offense, the State may introduce a requisition upon the governor of a sister State, to show how he was arrested.

3. *Bad character of deceased; when immaterial.*—Proof of the bad character of the deceased for turbulence and violence can not be received, when there was no act or conduct of the deceased, at the time of the killing, which can be illustrated by such bad character, or when there is no evidence tending to show that the killing was in self-defense; and charges based on such bad character, in such a case, are properly refused.

4. *Negligence of wounded man or nurses; when immaterial.*—Where death is caused by a dangerous wound, the person inflicting it is responsible for the consequences, though the deceased might have recovered with the exercise of more prudence and with better nurses; and a charge is properly refused which instructs the jury, without regard to the character of the wound, that the prisoner can not be convicted of murder, although the wound was inflicted with malice aforethought, pursuant to a formed design to kill, &c., if the wounded person died from the gross carelessness of himself or nurses.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The appellant, Bowles, was convicted of the murder of Albert Smith, and sentenced to imprisonment in the penitentiary for life.

The evidence shows that Bowles lived some seven miles from the city of Mobile, and on the morning of the shooting, the deceased and one or two other persons passed by the house in which appellant, Bowles, lived, on their way to Mobile, as one of these persons had promised to call Bowles as they went by. On the return of the party from Mobile, as they got near the house, the deceased being in the road, some few feet from the gallery of the house, Bowles came out on the gallery, and, addressing the party, asked: "Why didn't you holler this morning?" Deceased asked who he was talking to, and Bowles replied "as soon to you as any other man." Deceased replied, "come out here and I will talk to you." Bowles said, "I'll come out and shoot you too," and

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he then came out to where deceased was, drawing a pistol as he came, and when within three feet of deceased presented the pistol. One of the party begged him not to shoot, and he lowered his pistol for a few moments, and again raised it and fired on deceased, who was leaning on a small stick, which he always used to assist in walking, as he was lame in one leg. The deceased was unarmed and had made no motion or attempt to use his stick or other weapon. One of the witnesses caught hold of the prisoner, and remarked that he had killed the man for nothing, but prisoner shook witness off, saying that he would shoot him or any other man when he was mad. Smith fell soon after he was shot, and Bowles fled. One witness testified that "about two weeks before the shooting, deceased and Bowles had some words at a timber camp, Smith coming into camp, and Bowles right after him; that Smith said, to one of the men, the boss (meaning Bowles) is pretty hot this evening, and, continuing his remarks, said 'I'll make him hotter than he is before I leave camp.' Bowles came up and asked what he said, and Smith replied 'nothing to you, sir.' Bowles then cursed Smith, and the latter replied, 'we will settle this some other time.' Just before this Bowles had discharged Smith for disobeying instructions about cutting logs."

Dr. Grace, the physician who visited Smith the morning after the shooting, testified, he called for three consecutive days afterwards, and found the patient improving so rapidly that he thought it unnecessary to visit him again. He, therefore, discharged his patient, enjoining upon him and his attendants, the absolute necessity for his remaining in the house, where he was, and refraining from eating any solid food. The witness testified that "the ball entered the left breast, just below the sternum, and ranged backward and outward, through the lower lobe of the lung; that he (witness) did not regard the wound as necessarily dangerous, but feared pneumonia might set in. Two weeks after this, witness was sent for to see Smith at his own house, some twelve miles distant from the house into which he was taken when first shot, and being satisfied from the information given him that the patient would die before he could reach him, did not go." Witness was satisfied from the symptoms detailed to him that Smith died of pneumonia. Dr. Scales, who heard Dr. Grace's testimony as to the wound, testified that "if the wound was on the left side of the sternum, and just below, the ball would cut the diaphragm, the liver and the lung;" that a ball taking that course would be likely to produce pneumonia, which is very dangerous when superinduced by a wound in the lung; that such a wound could not

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be declared mortal or necessarily dangerous, or otherwise, within three days after it was inflicted.

Five or six days after receiving the wound, Smith ate roasted sweet-potatoes, and with some assistance walked to a wagon which had been sent for him, and rode over a rough country-road to his home, some twelve miles distant, where he died some twelve days afterwards.

It was proved that the deceased's general reputation was that of a violent and turbulent man, while appellant's general reputation was shown to be that of a quiet, peaceable and law-abiding man.

"The State offered in evidence a requisition from the governor of Alabama on the governor of Mississippi for the arrest of defendant on this charge, and when the defendant objected to its introduction, the court allowed it to go to the jury to the extent of its being the paper, or authority, upon which the defendant was arrested in Mississippi; whereupon defendant objected, and his objection being again overruled, he excepted."

The defendant requested the following charges in writing:

"1. If the deceased was a violent, turbulent man, and had threatened to kill the defendant, or to do him some great bodily harm, just previous to his being shot by the defendant,—and this is a question for the jury—the law justified the defendant in carrying a concealed weapon, and to protect himself with it against the defendant [deceased?] if necessary."

"2. The court charges the jury as a matter of law, that if one is shot, stabbed, or otherwise wounded or injured by another, even though the injury were inflicted after premeditation and with a formed design to kill, and the wounded person should die from the unskillful treatment of the physician, or the gross carelessness of himself or his nurses, the party inflicting the wound or injury could not be convicted of murder."

The court refused both these charges, and the defendant duly and separately excepted.

The admission of the requisition on the governor of Mississippi, and the refusal to give the charges requested, are now assigned as error.

JOHN H. GLENNON, for appellant.—The charges requested, asserted correct legal propositions, arising out of the testimony, and should have been given.—1 Brick. p. 479, § 439; *Pritchett v. The State*, 22 Ala. 39. The requisition on the governor of Mississippi was illegal and irrelevant evidence.

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Its only effect was to prejudice the prisoner's defense, by proof of matters not connected with the killing.

JNO. W. A. SANFORD, Attorney-General, *contra*.—The first charge requested was properly refused. The deceased was not doing anything which could be tortured into an attempt to carry out any threat, or do the appellant any bodily harm. The case made by the record has no element of self-defense in it.—*Franklin v. The State*, 29 Ala. 14. The second charge has already been condemned by the court in McAllister's case (17 Ala. 434), and was properly refused.—2 Brick. Crim. Law, § 653. The defendant fled immediately after the shooting. The requisition was admissible to rebut the idea that he had returned voluntarily to stand his trial.

BRICKELL, C. J.—All evasions, or attempts to evade justice, by a person suspected or charged with crime, are circumstances from which a consciousness of guilt may be inferred, if connected with other criminating facts. Of themselves, they may not warrant a conviction, but they are relevant as evidence, and the weight to which they are entitled, it is the province of the jury to determine, under proper instructions from the court.—*People v. Stanley*, 47 Cal. 113; (S. C.); 2 Green's Cr. Rep. 437; Wharton on Homicide, § 710; Burrill on Cir. Ev. § 22, 469. Flight, for which no proper motive can be assigned, and which remains unexplained, is a circumstance all authorities agree it is proper to submit to the jury, in connection with other evidence tending to show the guilt of the accused. In the old common law, the rule which passed into a maxim, was, that flight was equivalent to a confession of guilt: *fatetur facinus qui judicium fugit*. At the present day it is regarded as a mere criminative circumstance, indicative of a consciousness of guilt, and of an attempt to evade justice, which is subject to infirmative considerations that may deprive it of all force. The unfavorable inference against the prisoner would be lessened if he voluntarily returned and surrendered himself to answer the accusation. Whether its force, as a criminative fact, is increased by proof that his return was compulsory under the process of the law, and that the flight was beyond the jurisdiction of the State, it is for the jury to determine. We think it permissible to prove the fact of flight, and all the facts connected with it, either to increase or diminish the probative force of the fact itself. The requisition of the governor for the arrest and surrender of the prisoner, was admitted by the City Court, for the sole purpose of showing the authority

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under which he was arrested in Mississippi. For that purpose it was admissible in the view we have taken.

2. There was no error in the refusal of the charges requested by the prisoner.—*Pritchett v. State*, 22 Ala. 39; *Franklin v. State*, 29 Ala. 14; *Eiland v. State*, 52 Ala. 322; *McAllister v. State*, 12 Ala. 434; *Morea v. State*, 2 Ala. 275; *Parsons v. State*, 21 Ala. 300.

We find no error in the record, and the judgment must be affirmed.

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Action on Account Stated.

1. *Set-off; plea of, what evidence does not authorize.*—A plea of set-off for "moneys collected" for insurance on goods shipped plaintiff and not accounted for, etc., interposed to an action against defendant upon account, does not authorize any evidence or question as to want of diligence on the part of the plaintiff, in not obtaining the part of the shipment not lost, and on which insurance was not collected.

2. *Recoupment, defense of; what confined to.*—The defense of recoupment is confined to matters arising out of, or connected with the transaction which forms the basis of the plaintiff's claim; and the court properly instructs the jury to find against the plea, if it be shown that the matters upon which it rested, do not arise out of, and are unconnected with the matters upon which the plaintiff's action is based.

3. *Debt; where payable.*—In general, in the absence of something to the contrary in the contract, it is the duty of the debtor to make payment at the residence of the creditor—hence, where suit is brought here to recover a debt calculated according to the standard of a foreign country, and payable there, the verdict is properly directed for the amount of legal tend'r notes, at the time of the trial, required to put the amount due the plaintiffs at the place of their residence.

4. *Charge of court; what exception to unavailing.*—It is the duty of a party excepting to the general charge of the court to point out specifically the error complained of, that the court below may have the opportunity to correct it if erroneous, or the opposite party may waive the giving of the objectionable part. A mere general exception does not accomplish this purpose, and if reserved to the entire charge, containing distinct and separate propositions, some of which are correct and others incorrect, the exception will be unavailing.

5. *Same.*—An exception to the general charge of the court, couched in language as follows, "To which charge, and each and every part of it, defendant excepted," is a mere general exception, and unavailing, unless the charge is erroneous as an entirety.

6. *Same; when refusal to give, not revised.*—The refusal to give charges requested, will not be revised on error, unless it affirmatively appears they were asked for in writing.

APPEAL from Circuit Court of Mobile.
Tried before Hon. H. T. TOULMIN.

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The opinion states the facts.

BOYLES & OVERALL, for appellants.

D. C. ANDERSON and T. A. HAMILTON, *contra*.

MANNING, J.—Appellees, merchants of Liverpool, England, sued appellants as executors of D. O. Grady, deceased, for £539 3s. 6d. alleged to be due as the balance of an account, on the 31st December, 1871. One of the pleas of defendant, in short, was: "Off set of the sum of nine hundred and eighty pounds sterling, *monies collected* for insurance of cotton, shipped by the steamer "Rhine," and lost and not paid to D. O. Grady, nor credited for to him or his legal representatives."

In respect to this, the cotton was insured for £2,600, of which £2,135 7s. 4d. were accounted for to D. O. Grady. The vessel was wrecked in the West Indies. "All the insurance money was not collected, because it was not a total loss. It was a particular average claim, and was regularly adjusted by Messrs. Bailey, Lowndes and Stockley, average adjusters of Liverpool. The said D. O. Grady was credited with the full amount" received by plaintiffs, less certain deductions, which were shown to be proper. It was shown, also, that plaintiffs did not get any of the cotton shipped by the Rhine.

Appellants desired the court to instruct the jury to the effect that the plaintiffs were accountable for the value of the cotton saved, or for the balance of the sum for which it was insured, if they failed to get the same by want of due diligence, and that the burden was upon them, as the evidence stood, to show that they had used due diligence and effort to do so. The court correctly refused to give such a charge for the reason, that under the plea, the question of diligence or negligence in that respect, was not put in issue. The off set pleaded was of moneys actually collected and not accounted for.

Appellants also pleaded recoupment, that their testator had, in 1867, sustained a loss, to a large amount, by the failure of plaintiffs to obey his instructions, in not selling a certain other large quantity of cotton shipped by Grady, on a vessel called the "Caribbean," to them for sale. There was no evidence to support this plea; and the transaction to which it related, and others following it, had been fully settled up and closed long before the dealings were had, out of which plaintiff's present claim arose. The court charged the jury that, "if they were satisfied from the evidence that the matters of that transaction form no part of the balance

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sued for in this action, they should find against the defendant, so far as the plea of recoupment was concerned."

In this there was no error. A defense by way of *recoupment*, denies the validity of the plaintiff's cause of action, to so large an amount as he claims. It is not an independent cross demand, like a separate and distinct debt or item due from the plaintiff, but is confined to matters arising out of or connected with the contract, or transaction, which forms the basis of the plaintiff's claim.—*Waterman on Set-off*, § 424. *Batterman v. Pierce*, 3 Hill, 171.

Appellant's counsel contended that the jury ought to have been instructed that, if they should find in favor of plaintiffs, they should, in determining the amount of their verdict, ascertain how much the sum due in pounds, shillings and pence, in England, amounted to in American gold coin, and that they could not add to that amount any more than the difference of exchange in favor of England upon such gold coin. This the court properly refused. A judgment in dollars here, is solvable in the legal tender treasury notes issued by the United States to circulate as money, which were shown to be below par in comparison with gold. It is the duty of a debtor to pay his creditor, when nothing in the contract or transactions between them changes the general rule, at the place of residence of the creditor. What appellants owed to the plaintiffs, was due to them in English money, in England; and the verdict in the court below should have been rendered for so many dollars and parts thereof, as it would require in legal tender notes of the United States, at the time of the trial, to put the amount due to plaintiffs at Liverpool in England. It required this much to make the plaintiffs whole. The court, in effect, so charged the jury.

These are the only material questions, which it was intended that this record should present. But it does not properly present them.

In *Holland v. Barnes*, (53 Ala. pp. 87-8,) in reference to the manner of excepting to charges to the jury in a lower court, it was said: "The court gave a lengthy charge to the jury to which a general exception was reserved. The charge certainly asserts several correct legal propositions arising out of the evidence. The exception is directed as well against these propositions, as against any other parts of the charge. Unless it was maintained as well to these propositions as to others supposed to be erroneous, we would be compelled to do for the appellant what he would not do for himself, to analyze the charge, and if error is found in it, to direct the exception to the error. That was his duty, which he can not

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devolve on this court,"—or, we may add, on the judge of the court below. "If there be error in the charge, and the attention of the court had been called to it by an exception, it could then have been corrected. Or, the appellee may have deemed the charge, in the respect singled out, as erroneous, not important to a recovery, and have waived it. The appellant can not, by a general exception of this character, deprive the court of the power of correcting an error into which it may have fallen by an inadvertence, nor his adversary of the right to waive it, rather than incur the hazards of a reversal. No such general exception can be supported, unless the charge as a whole is erroneous."

We reproduce and call attention again to this ruling, in order to correct, if possible, a very embarrassing practice, and avert protracted, expensive and unnecessary litigation.

The exception to a long charge given to the jury, in this instance, by the circuit judge voluntarily, and consisting of several distinct instructions upon different aspects of the case, some of which instructions were obviously correct, is as follows: "To which charge, and each and every part of it, defendants excepted." And to the eleven instructions given by the court, at the request of the appellee's counsel, and of which the same observation may be made, that some of them were obviously correct, the exception is as follows: "To all of the above charges, and each and every part of the same, the defendants excepted." Now, it is apparent that exceptions in this form, are obnoxious to the very criticism, directed in the extract above, against a merely general exception. They do not indicate in what the supposed errors consist, so as to enable the judge to correct his charge, or the other party to waive it, when it is inadvertently erroneous in the particular mentioned, or is not material to the decision of the cause.

Exceptions like those just quoted from the record before us, have often been held to be general exceptions and therefore unavailing, when made to testimony in a cause. And the reasons for such a ruling in those instances, hold equally good when the exception is made in like manner to a charge of the court as a whole, which consists of several distinct and complete instructions, some of which are correct.

In respect to the charges asked by the appellants and refused by the court, it does not appear that they were in writing, as the statute requires they should be. And it has been several times decided to be a sufficient reason for sustaining the refusals of the circuit judges to give instructions asked, that the record does not show that they were in writing.

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As the decisions referred to in regard to the practice, have some of them been made so recently that they may not have come to the knowledge of counsel when this cause was tried, our satisfaction is greater at perceiving that there was no such error committed by the court below in its charges and refusals to charge, as could produce injury to appellants.

Let the judgment of the Circuit Court be affirmed.

Jones, *pro ami*, v. Fellows *et al.*

Bill in Equity to compel Settlement of Guardianship.

1. *Settlement of guardian, what valid.*—A decree rendered on final settlement of a resigned guardian, is not erroneous or invalid, because it shows that the minor was represented on the settlement by the succeeding guardian, instead of a guardian *ad litem*; and such decree, in the absence of fraud, or other equitable ground of relief against it, is conclusive on the minor.

APPEAL from Chancery Court of Dallas.

Heard before HON. CHARLES TURNER.

This was a bill filed by the appellant, Olive Jones, by next friend, against the appellee, Fellows, her former guardian, and others, and sought to compel an account and settlement by Fellows in the Chancery Court, and to charge him with certain investments of her monies in Confederate bonds, which will be noticed hereafter. The bill alleged that Fellows made a pretended final settlement of his guardianship in 1864, which was void, for the reason that no guardian *ad litem* was appointed to represent appellant; no notice of settlement given; that said pretended settlement was wholly *ex parte* and void; and that Fellows had never made any legal final settlement of his guardianship.

The case made by the bill, answer and testimony, is as follows:

Josephus D. Echols, the father of complainant, died in the year 1855, seized of a large estate in lands and personal property, and leaving, as his heirs at law, the appellant and three other children, all of whom were minors at time of his death. Shortly after his death W. W. English, his brother-in-law, was appointed administrator of his estate, and on the 6th day of July, 1857, English was also appointed guardian of his children, and gave bond as such; and in June, 1859, English, on account of the personal relations between himself and one of his bondsmen, and without any order of court

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therefor, executed a new bond as guardian, upon which the appellee, Fellows, became his surety. This bond was duly approved by the Probate Court. On the 2d day of January, 1861, English died without having settled either his administration of Echols' estate or the guardianship of his children, including the appellant. On the 17th day of January, 1861, Fellows was appointed guardian of the appellant and one of her sisters, the other Echols heirs being then of age, and on the same day became the administrator *de bonis non* of the estate of J. D. Echols, their father. About the same time one Waller became the administrator of W. W. English, and as such administrator, on the 1st day of May, 1861, he made a final settlement of English's administration of the estate of J. D. Echols and his guardianship of the Echols heirs, upon which settlement it appeared that the estate of English was indebted to appellant in the sum of five thousand three hundred and nine dollars and fifty cents. On the 1st of May, 1862, Fellows made a final settlement of his administration of the Echols estate, accounting for all the property of the estate which had come to his hands and was discharged. On this settlement he paid to the adult heirs the amounts due them, and carried the shares of the minors to their account with him as their guardian. On the same day (May 1, 1862,) Fellows made an annual settlement of his guardianship of appellant and her sister, on which settlement he is charged with their distributive share in the estate of their father, found due them on the final settlement of Fellows' administration of it. English in his lifetime, having as guardian of appellant and her two sisters, agreed with their brother William Echols to purchase his interest in the plantation belonging to the estate of their father, and soon after his appointment as guardian, Fellows reported these facts to the Probate Court, which thereupon made an order authorizing him, as such guardian, to carry into effect this agreement, which he accordingly did; and thereafter he managed the plantation, as the guardian of the minors and agent of the adult sisters, making annual settlements in the Probate Court, and charging himself as guardian with the amount found due his wards on each of such settlements. On the 1st day of May, 1863, Fellows made an annual settlement as guardian of appellant, on which settlement he is charged with four thousand dollars, collected by him on the 1st day of November, 1862, in Confederate currency, from Waller as the administrator of English, on the judgment rendered in favor of his ward on the settlement of English's administration of the estate of J. D. Echols and his guardianship of appellant, and is credited with the notes of various persons to

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whom he had loaned his ward's money, and the necessary disbursements for her maintenance and education.

On the 2d day of March, 1864, the appellant having expressed a desire that her brother William Echols should take charge of her property, Fellows resigned his guardianship of appellant and turned over to her brother, who had on the same day been appointed her guardian, all the property of his ward then in his hands. On the 2d day of June, 1864, Fellows, as the former guardian of appellant and agent of her sisters, made a final settlement of his guardianship and agency in the Probate Court. The account filed for final settlement was shown to William Echols, as the guardian of appellant and agent of his other sisters, more than a month before the settlement was made, Fellows at the same time showing Echols his books in which he kept the record of guardianship and agency. Echols expressed himself satisfied, and it was agreed between Echols and Fellows that, to save costs, publication should be waived and the account as stated should be passed and allowed by the Probate Court, which was accordingly done; these facts being made to appear to the court. On the final settlement of his guardianship of appellant, made on the 2d day of June, 1864, Fellows is charged with six thousand one hundred and ninety-two dollars and seven cents, and is credited with a like amount. In his accounts he is charged with the sum of three thousand and twenty-four dollars and sixty-five cents, received by him on the 7th day of August, 1863, as his ward's share of the proceeds of a house and lot which belonged to the estate of her father, and which had been sold by order of the Probate Court for division, upon the application of the other Echols heirs, and is also charged with eighty dollars interest collected on Confederate bonds belonging to his ward's estate, and is credited with two thousand dollars in Confederate bonds, which as guardian he had, on the 7th day of August, 1863, purchased with part of the money received by him as his ward's share of the proceeds of the house and lot sold as above stated. After the war, appellant (who was a minor at the time) repudiated the sale of the house and lot; brought suit against the purchaser; and, in compromise, sanctioned by the Chancery Court, received two thousand dollars in legal tender notes of the United States for her interest in said house and lot. Fellows' accounts, leaving out the debit for the proceeds of the house, received by him as guardian, and the interest on the Confederate bonds, and allowing no credit for the bonds, shows his ward indebted to him on final settlement, in the sum of eleven hundred and four dollars and sixty-five cents.

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On the hearing, the Chancellor decreed the settlement made by Fellows on the 2d day of June, 1864, a valid and binding settlement, constituting a bar to the relief sought, and dismissed the bill. This decree is here assigned as error.

SMITH & ROULHAC, and PETTUS, DAWSON & TILLMAN, for appellants.

FELLOWS & JOHNS, and BROOKS, HARALSON & ROY, *contra*.

STONE, J.—“In the settlement of the accounts of guardians, and in all the preparatory proceedings thereto, and appeals therefrom, the law providing for the settlement of the accounts of executors and administrators in this Code, and appeals therefrom, so far as applicable, and not in hostility with any provision of this chapter, applies to, and is in full force as to guardians and their sureties.”—Code of 1876, § 2793.

“The court must appoint a competent person to represent the interest of minors and persons of unsound mind, interested in such settlement.”—*Ib.* § 2510.

The reason why a *guardian ad litem* must be appointed and assigned to represent the infant, or infants, in such settlement, is very obvious. Without such appointment and representation, important interests of persons not *sui juris*, would be heard and determined, with no one of discreet years to guard their interests. The issue, in such case, is between the personal representative or guardian on the one hand, and a minor, helpless in contemplation of law, on the other. Legislative wisdom has ordained that this unequal contest shall not be tolerated; and hence a discreet person of mature age is required to be appointed, to see that justice is meted out to minors and persons *non compos mentis*.

The issue and settlement in the present case was between Fellows, the resigned guardian, and Echols, brother of the ward, chosen by her, and appointed by the court, to be her guardian. It was in no just sense a settlement between the guardian and his ward. It was a settlement between the outgoing guardian and his incoming successor. The new guardian having notice, it was his duty to see that his predecessor was brought to a fair and full account, as it was his duty to possess himself of all the estate and effects of his ward. There was no use for a *guardian ad litem*; for her proper guardian was there, whose interest and watchfulness would be more keenly alive than those of a mere guardian *ad litem* could be supposed to be. In settling such an issue,

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the true inquiry is, how much shall be paid by the former guardian to the present one? No one, it is supposed, would so faithfully represent the ward, as the regularly appointed and bonded guardian.

In *Smith v. Smith*, 21 Ala. 761, this court said: "The record recites that on the day and at the term appointed for the final settlement of the estate, the administrators appeared and presented their accounts; which are shown to have been previously reported and filed for settlement; and, also, that the guardian of the minor heirs appeared. These recitals are conclusive, as to the fact of the appearance of the minor heirs by their guardian; and as this legal appearance would dispense with the necessity of notice, the real question is, whether the minors, who are interested in the distribution of an estate, can properly be represented on its final settlement by their general guardian. . . . It is unnecessary to cite authorities to sustain the position, that, in general, the appearance of an infant by such a guardian is good; and we think, also, that generally speaking, he feels a higher degree of responsibility in protecting the rights and interests of the ward, than the guardian *ad litem* appointed by the court, who seems usually to consider his duties as limited to a denial of all matters which may affect the rights of the ward, without resorting to any positive or active measures to secure them. It is true, that when the general guardian is an incompetent or unfit person to represent the infant, it would unquestionably be the duty of the court to appoint a suitable person guardian *ad litem*; but in those cases in which the general guardian does appear, and is recognized by the court as the representative of the minor, we can perceive no good reason why the appearance should not be sustained."

So in *Morgan v. Morgan*, 35 Ala. 303, this court ruled that, "on the final settlement of an estate, an infant distributee may be represented by his general guardian; but if there be no general guardian, or if, after being notified, he fails to attend, it is the duty of the court to appoint a guardian *ad litem*." See, also, *Rives v. Flinn*, 47 Ala. 481.

It is shown in the present record that Echols, the duly appointed general guardian of complainant, did appear; and that he examined and approved the accounts and the settlement. Advertisement was waived, to save expense. We perceive nothing in this which does not merit and receive our hearty approval. We hold that the final settlement made was in all respects regular, and that it is conclusive, unless assailed for fraud, or on some other equitable ground, not pretended or attempted in this record. We fully concur with the chancellor in commending the fidelity with which this trust was executed.

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Here this opinion might close. It is contended, however, for appellant, that in his final settlement Fellows was allowed a credit of \$2,000 for confederate bonds turned over to Echols, his successor. This item is found in Fellows' final settlement, made July 11, 1864, and is in the following language:

1863, August 7. "Confederate bonds from Lewis Davis, \$2,000." This item entered into the credit column, and produced the aggregate of credits, \$6,192.07. This item omitted, the credit column would foot \$4,192.07. In the debit side of that account is charged against Fellows, July 17, "From proceeds of sale of house and lot in Selma, his interest being one-fourth, \$3,024.65. 15th January, 1864, coupons on \$2,000 of Confederate bonds, \$80———" Total, \$3,104.65. This sum, taken from gross debits, \$6,192.07, will leave \$3,087.42, as the total debits with which Fellows should have been charged. Subtracted from total credits, \$4,192.07, leaves a surplus of credits over debits of \$1,104.65, with which Fellows was improperly charged on his final settlement with his successor. But why take these two items from the debit account? The Confederate bonds, \$2,000, being rejected as a credit, of course the interest realized on them, \$80, should be rejected as a debit. The item, \$3,024.65, was the one-fourth interest belonging to complainant, realized from the sale of lot in Selma. The record shows that, after the war, she repudiated this sale as not binding on her, and recovered the value of her one-fourth interest, \$2,000, in lawful money of the United States. She thus realized for her fourth interest in this lot its value in lawful money, and \$1,104.65, excess of collections made from Fellows in his settlement. And the testimony shows that the \$2,000 invested in the Confederate bonds purchased from Lewis Davis, were part of the money derived from the illegal sale of the Selma lot, which complainant repudiated, and thereby not only prevented it from injuring her, but disarmed herself from complaining of Fellows for its illegal investment. She can not be heard to renounce the sale, and hold Fellows accountable, at the same time, for improvidence in investing its products. She can not, at one and the same time, claim under and against the sale.

We have indulged in the reflections shown above, not because the question is legitimately before us in this case. It is not; for Fellows had made a lawful settlement, and was discharged. Our purpose is to show that even if we could go behind that settlement, Mr. Fellows could not be held accountable for the \$2,000 invested in Confederate bonds.— See *Horn v. Lockhart*, 17 Wall. 580.

The decree of the chancellor is affirmed.

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Indictment for Murder.

1. *Impeaching or sustaining witness ; predicate.*—Where a witness had answered affirmatively to the question, whether he knew the general character of another witness, such question and answer was a sufficient predicate to allow the former witness to testify to the good character of the latter who had been attempted to be impeached.

2. *Cross-examination ; proper question.*—It is not error, on cross-examination, to ask a witness, for the purpose of affecting his credibility, "if he had not pleaded guilty of stealing from a store," in a certain place—the trial referred to having been before a justice of the peace, and it was not shown that any record was made of it.

3. *What proof necessary to justify conviction ; circumstantial evidence ; inference from suspecting another party of the deed.*—To justify conviction the evidence must exclude, to a moral certainty, every reasonable doubt of guilt; and where the evidence is circumstantial, the circumstances must be so connected and complete as to exclude, to a moral certainty, every hypothesis but that of guilt. If the proof comes up to this measure, the jury must convict independent of any inference from the proof that some other person has been suspected of the crime; otherwise, it is their duty to acquit, though there may be no proof that any other person is suspected.

4. *Charge ; what proper in certain cases only ; absence of suspicion of other guilty agent.*—A charge to the jury in substance, that if the evidence tends to show that defendants committed the crime, "if it be a fact that no one else has been charged with or suspected of the crime, such fact is a circumstance to be considered by the jury," is proper only in cases like the present, where it appears from the proof that the absence of circumstances pointing to another as the guilty agent, tends to strengthen the evidence of the guilt of accused. (The charge asked, and the circumstances in this case, are similar to the same in Hall's case (40 Ala. 698, 707), and this court now adheres to the principle in Hall's case, but confines the same to cases in which the evidence is circumstantial, pointing strongly to the guilt of the accused, and proving him to have been at a place so near to the scene of the crime, as that, if innocent, he could probably furnish some trace, or circumstance, pointing to the guilt of another, or generating a doubt of his own guilt.)

5. *Same ; presumption that charge was proper.*—Where such a charge was given—there being cases in which it would be proper—and the bill of exceptions fails to set out enough of the evidence to show its inappropriateness, this court will presume, in favor of the court below, that there was evidence to justify the charge.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

The defendants, Jerry Childs, Isaac Childs, and Jacob Childs, were indicted at the spring term, 1876, of Dale county, for the murder of Rosamond You. They obtained a change of venue to the county of Henry, where, on the 5th of September, 1877, they were tried and convicted of murder in the first degree, and sentenced to be hanged on Friday, the 19th of October, following.

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The proof on the trial was, that Mrs. Rosamond You was shot with a gun, in her own house, in the night time, by some person unseen by her, or others present, and unknown to them, under circumstances constituting murder in the first degree. The evidence connecting defendants with the crime was mostly circumstantial. Among other witnesses, one J. R. Kelly was introduced by the State, and was asked by the State's counsel whether he knew the general character of one Mingo Williams?—said Williams having been examined by the State, and to impeach whom an effort had been made by defendants. Objection was made to the form of such question, for the reason, stated by defendants, that the question should be limited to the said Kelly's knowledge of the said Williams' character for truth and veracity. The court overruled the objection, and the defendants excepted. The witness then testified that he knew the general character of said Williams, which was good, and that from such knowledge he, Kelly, would believe said Williams on oath. One Jake McIntyre, a witness for defendants, being on the stand, was asked by the State's counsel, on cross-examination, "have you not been convicted of larceny?" The defendants' counsel inquired, "where?" and the State's counsel, after conferring with the prosecutor, answered, "from a store in Newton." The defendants' counsel then inquired, if "in a court of justice?" to which the State's counsel answered, "yes." The defendants' counsel then objected to the question on the ground that the fact solicited by the question was capable of higher proof—by record evidence. The question was allowed, and defendants excepted; whereupon the witness answered, that he had pleaded guilty, in a justice's court in Dale county, of stealing.

Upon the conclusion of the evidence, the court charged the jury, among other things, that, "If there is evidence tending to convict the defendants, the fact, if it be a fact, that no one else has been charged with or suspected of the crime, is a circumstance to be considered," to which the defendants excepted. There was no evidence that any one else was charged with or suspected of the crime alleged in the indictment.

J. G. COWAN, and J. A. CORBETT, for appellants.—1. It was error to try the defendants the first week of court. The act changing the term of Henry Circuit Court from two weeks to one week (acts 1876-7) is void—the journal of the Senate nowhere showing a compliance, in its enactment, with the requirements of § 27, Art. 4, of the Constitution.

2. The court erred in overruling objection to the form of

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question asked the witness Kelly.—See dissenting opinion of Stone, J., in *Ward v. State*, 28 Ala. 53.

3. The court erred in permitting the State to prove McIntyre's conviction of crime in the manner set out. The fact of conviction was susceptible of higher evidence.—See 1 Greenl. Ev. § 457; *Newcomb v. Griswold*, 24 N. Y. App. 298. The fact that the conviction was before a justice of the peace does not change the rule. The court must know that § 4698 of the Code requires justices to keep dockets of criminal cases tried before them. By virtue of said section a justice's court is, in all criminal proceedings had before it, a statutory court of record.—See, also, *Ware v. Robinson*, 18 Ala. 105.

4. The court erred in giving that portion of the charge excepted to. It was calculated to mislead the jury. It is submitted that *Hall v. The State*, 40 Ala., upon this question, is not correct authority. Great injustice might thereby be done defendants, who, being in jail, are prevented from making efforts towards the detection of the real perpetrator. In Hall's case, *supra*, the defendant was charged with the murder of his wife, and if this court adheres to the ruling in that case, it should be confined in its application to cases of like character.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The court did not err in permitting a question to be asked concerning the general character of a witness.—*Sorrell v. Craig*, 9 Ala. 535-8; *Ward v. The State*, 28 Ala. 53.

2. The court did not err in permitting the witness to be asked, "Have you not pleaded guilty to stealing from a store in Newton?" The contents of pleadings were not the subject of inquiry. The witness was questioned merely as to his past conduct. The fact of the existence of a plea and not its contents, was all that was involved. In such case the production of the plea was unnecessary.—*Neal & Hicks v. State*, 53 Ala. 465-7.

3. The court did not err in that part of the charge to which defendants excepted.—See *Hall v. State*, 40 Ala. 700, *et seq.*

STONE, J.—It is objected that, inasmuch as the trial and conviction in this cause were had during the first week of Henry Circuit Court, the judgment of conviction should be reversed, because the act, reducing the term of that court from two weeks to one—Pamph. Acts 1876-7, p. 141—is not shown by the journal of the Senate to have been signed by the president of that body," in the presence of the house over which he presided, . . . after the title had been publicly read immediately before signing."—Constitution of 1875,

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Art. 4, Sec. 27. We know not why, nor on what information this point is urged. On page 315 of the Senate Journal of that session, it is shown that the objection is not founded on fact.

We do not think counsel should take such position as that noted above, and cast on us the labor of consulting the journal, without some good ground, or well founded belief, in which to base it.

In what we have said, we do not wish to be understood as holding that a trial and conviction in a criminal case, had during the first week of a court, which is required by law to sit two weeks, would, for that reason, be reversed.

1. There was no error in allowing the witness, Kelly, to testify to the good character of the witness, Mingo Williams, who had been attempted to be impeached. Kelly had answered affirmatively the question, that he knew the general character of said Williams; and this, under the rulings of this court, was a sufficient predicate to let in the evidence. *Ward v. The State*, 28 Ala. 53.

2. Neither do we think there was any error in allowing the question to be asked the witness, McIntyre, "if he had not pleaded guilty of stealing from a store in Newton." The trial referred to was had before a justice of the peace; it was not shown that any record was made of it, and there was no attempt to prove his conviction of the offense, so as to show him incompetent to testify. The question was put on cross-examination, with the evident design of affecting his credibility—nothing more. For that purpose, on cross-examination, it was competent.—See *Neal v. The State*, 53 Ala. 465.

3-4. The charge excepted to is, in substance, the same as that given in the case of *Hall v. The State*, 40 Ala. 698, 707. This court, while criticising that charge, nevertheless refused to reverse the ruling of the Circuit Court on that question. The court added: "The weight of the absence of such evidence is increased by the probability that if any other person had perpetrated the deed, there would have been discovered traces of it. 'In a criminal case (says Starkie), where all the circumstances of time, place, motive, means, opportunity and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of another agent, although, had any other existed, he must have been connected with the perpetration of the crime, by motive, means and opportunity, and by circumstances necessarily accompanying such acts which usually leave manifest traces behind them.'"

The case of *Hall*, *supra*, in its undisputed facts, was of
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such a character as that the absence of criminating circumstances, pointing to some other person as the guilty agent, would tend to strengthen, in the inquiries of any honest mind, the circumstantial evidence of guilt, which was in proof against him. He was indicted for the murder of his wife, who had died of violence in the night time, in her own house, the accused being at home; and, it was shown that at the time of the violence, he must have been in or near his residence. Under these circumstances, if another had done the deed, it is probable the accused could have shown some fact or circumstance in support of such theory. His failure to do so, in that case, was ruled to be, "a circumstance to be considered by the jury as evidence against the defendant." But even in that case, this court said the charge was liable to mislead the jury, and that it might have been improved in clearness and precision.

We are not inclined to overturn the authority of Hall against the State, in cases whose facts are similar to those therein presented. But we think the charge given in this case would be improper in cases otherwise circumstanced, and that its general tendency would be to mislead. As a rule, when a criminal charge is preferred, to justify a conviction, "the evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused." Best. on Ev. § 440; *Boots Coleman v. State*, at the present term. And when the evidence is circumstantial, the circumstances must be so connected and complete as to exclude, to a moral certainty, every hypothesis but that of his guilt. If the proof comes up to this measure, then it is the duty of the jury to convict, independent of any inference to be drawn from the absence of proof that some other person has been charged with or suspected of the crime. On the other hand, if the proof does not come up to this full measure, then it is the duty of the jury to acquit, although there may be no proof that some other person is charged with or suspected of the commission of the offense. We, therefore, confine the principle asserted in Hall against the State, to cases in which the evidence is circumstantial, pointing strongly to the guilt of the accused, and proving him to have been at a place so near to the scene of the crime as that, if innocent, he could probably furnish some trace, or circumstance, pointing to the guilt of another, or generating a doubt of his own guilty agency. Thus explained, we adhere to the principle asserted in Hall v. The State, *supra*.

Lest what is said above may be misunderstood, we will add that it is only when the suspicion that another was the offender springs out of facts or circumstances legitimately in

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evidence, or which might be legitimately put in evidence, that such suspicion *vel non* should be considered by the jury. And that body cannot be too cautious in giving weight to such circumstance. It is at best more a question of casuistry, defining the mental processes by which truth is attained, than of positive law. It is part and parcel of that exacting system of reasoning, by which, in criminal trials, the mind associates the existence of some fact, not positively proven to exist, by the proof of other facts, which demonstrate its existence. To authorize a conviction in a criminal trial, the facts and circumstances proved to exist, and believed by the jury, must be so connected and complete, as to lead the mind of the jury, with moral certainty, to the conclusion that the defendant is the guilty offender; and, with equal moral certainty, must exclude the idea that another did the deed. One includes the other; for if the facts and circumstances, duly and honestly weighed, leave a reasonable doubt of the *exclusion* mentioned in the second branch of the sentence above, then the moral certainty of *conclusion*, mentioned in the first branch of the sentence, has not been reached, and the defendant should be acquitted.

From what we have said above, there are cases in which the charge, excepted to in this case, may be given. The record informs us that the testimony, tending to show that the prisoners were the murderers, "was, for the most part, circumstantial." What those circumstances were, or how proved, is not shown. The bill of exceptions set out but little of the evidence. Under an inflexible rule of this court, when an affirmative charge asserts a legal proposition which would be correct under a conceivable state of proof, and the bill of exceptions fails to set out all the evidence, or enough of it to show the inappropriateness of the charge, this court, in favor of the correctness of the ruling below, will presume there was evidence to justify the charge given.—*Morris v. The State*, 25 Ala. 57; *Tempe v. The State*, 40 Ala. 350; *School Commissioners v. Godwin*, 30 Ala. 242; *Fleming v. Ussery*, *Ib.* 282.

The judgment of the Circuit Court is affirmed; and Friday, the 22d day of March next, is set for the execution of the sentence of the law, as pronounced by the Circuit Court.

[Washington et al. v. The State.]

Washington et al. v. The State.*Indictment for Larceny.*

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1. *Challenge of juror for cause; what not ground.*—That a juror is first cousin to the prosecuting attorney is no ground of challenge for cause.

2. *Description of animal stolen.*—It is no objection where the animal stolen was a "pig," that it should be alleged in the indictment as a "hog."

3. *Refusal to pass on evidence, and discharge co-defendant.*—Where there was some evidence tending to show that a co-defendant was a participant in the commission of the offense, its sufficiency being a question for the jury—whether he was an accomplice, being one of the questions—the court properly refused to pronounce criminating evidence unworthy of belief, and order such prisoner's discharge on the ground that there was not sufficient evidence to convict him.

4. *When ruling of court below not reviewed.*—The Supreme Court declines to consider testimony stated in so confused and uncertain a manner that they cannot tell precisely what was the ruling of the court below.

5. *Charge; what properly refused.*—A charge that "proof of contradictory statements or declarations on a material point made by a witness may be sufficient to raise a reasonable doubt in the minds of the jury," is, as it stands, calculated to mislead the jury. Such a charge would be proper if it contained the additional clause "if the guilt of the prisoner depended upon the testimony of this witness," or this, "if the truth of this witness' testimony."

6. *Same; what error to refuse.*—A charge, speaking of the corroborating evidence necessary to sustain a witness not worthy of credit, which says "such corroborating testimony in order to avail anything must be of a fact tending to show the guilt of defendant," is proper and its refusal is error.

APPEAL from the Perry Court of Quarter Sessions.

Tried before the Hon. POWHATTAN LOCKETT.

The indictment in this case charged that "Andrew Washington and George Neal feloniously took and carried away a hog, the personal property of one Robert Harper," &c.

While the jury were being empaneled it was agreed between the defendants' counsel and solicitor, that one Wm. Pitts, a cousin of the solicitor, who had been drawn as a juror, should be excused from the jury because of such relationship, but the court refused, and defendant excepted. The case then proceeded to trial and the prosecutor testified that he lost from his plantation a Berkshire "pig," to which defendant objected, because the indictment alleged a "hog," but the court overruled the objection, and defendant excepted. The prosecutor then testified as to the stealing, &c.

Defendant's counsel moved, after the State had closed its evidence, to discharge George Neal, a co-defendant, on the ground that there was not sufficient testimony to convict him, or put him on his defense, under section 4896 of the Code.

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The court refused the motion and the defendant excepted. The testimony against Neal was light, though it *tended* to show that he was an accomplice.

Among other charges, the defendants asked the following, in writing: 1st. Proof of contradictory statements or declarations on a material point made by a witness may be sufficient to raise a reasonable doubt in the minds of the jury." "3d. The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction *with* corroborating testimony." "4th. Such corroborating testimony, in order to avail anything, must be of a fact tending to show the guilt of defendants." The court refused these charges, and defendants excepted.

BUSH & PITTS, for appellants.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—The objection to the juror did not fall within any of the grounds of challenge for cause, and, therefore, the court did not err in overruling it.—Code of 1876, §§ 4734, *et seq.*; 4881 *et seq.*

The objection to the description of the animal, alleged to have been stolen, as a hog, was not well taken.—*Lavender v. The State*, at the present term.

We do not think the court erred in refusing to pass on the sufficiency of the evidence to convict George Neal. There was some testimony tending to show he was a participant in the commission of the offense charged, and its sufficiency, under proper instructions, was a question for the jury. Whether he was an accomplice was one of the questions before the jury, and it would require a very strong case to justify the court in pronouncing criminating evidence unworthy of belief, and, on that account, to order the discharge of the prisoner against whom he had testified.—Code, §§ 4894–5.

The testimony of the appearance of the health is stated in so confused and uncertain a manner that we can not tell precisely what was the ruling of the court; and we decline to consider it.

One piece of testimony we can not perceive the relevancy of. It is that Alex. Baylor was permitted to testify, against the objection of defendant, "that Burrell and Wm. Christian had come to his house Sunday before last, and called for Shep Clarke at his house." Shep Clarke had given very important testimony against the prisoners, to the effect that he had seen them with the stolen hog. He had been asked

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if he had not made different and contradictory statements to Burrell and Wm. Christian—denied it, and they had testified, contradicting him. The State then, in rebuttal, offered the testimony above copied. It is stated in the record that it contains all the evidence, and what is recited above is all the record contains, tending in the remotest degree to show the materiality of the evidence objected to. If necessary we would reverse this cause on the admission of this evidence, in the condition of the present record.—1 Brick. Dig. 505, relevancy and admissibility of evidence in criminal cases.

Possibly there is something, not shown, which proves its materiality, and on another trial it may be made to appear. There is nothing in this record to show it.

The first and fourth charges asked by the prisoners, and refused by the court, need some comment. The first would have been free from error, if it had contained a little more. To the words, "sufficient to raise a reasonable doubt in the minds of the jury," something should have been added. Reasonable doubt of what? Not necessarily of the guilt of the accused; for the other evidence in the cause might exclude all reasonable doubt of guilt. The charge should have contained a clause, somewhat to this effect: *If the question of the guilt of the accused depends on the testimony of this witness*; or, to this effect: *A reasonable doubt in the minds of the jury of the truth of this witness' testimony.* This charge was calculated to mislead, and was rightly refused.

Charge four had been substantially given in the general charge, but it asserted a correct legal proposition; and being asked in writing, and not abstract, it should have been given.

For the error pointed out above, the judgment of the Court of Quarter Sessions is reversed, and the cause remanded. Let the prisoners remain in custody until discharged by due course of law.

[Young v. The State.]

Young v. The State.

Indictment for Selling or Giving Liquor to Person of Known Intemperate habits.

1. *Penal statute; no conviction for violating policy of.*—Penal laws are not, by construction, made to embrace cases not plainly within their meaning. One can not be convicted for doing an act which contravenes the mere policy of a penal statute.

2. *Selling liquor to intemperate person; what not within the statute.*—Where the defendant received a dollar from one B., whom he knew to be a person of intemperate habits, and under B.'s promise that he (defendant) was to have any surplus of the money, went and purchased of a liquor dealer a bottle of whiskey and delivered it to B.,—*Held*, that this was neither a selling nor giving of liquor to B. by defendant, and was not within the terms or contemplation of the statute.—Code of 1876, § 4205.

APPEAL from Circuit Court of Dale.

Tried before Hon. H. D. CLAYTON.

The opinion states the case.

B. F. CASSADY and W. D. WOOD, for appellant.—1. All criminal statutes must be strictly construed, and can not be extended by construction, and this strict rule of construction would certainly give the words "sell" and "give," in the Code of 1876, § 420, their common import and signification. See *Crosby v. Hawthorn*, 25 Ala. 221; *Bettis v. Taylor*, 8 Port. 564; *Barilett & Waring v. Morris*, 9 Port. 266; *Thurman v. State*, 18 Ala. 276.

2. The defendant in this case acted in the capacity of Blackwood's agent.—See *Story on Agency*, 8th ed. § 3. Could defendant, therefore, as such agent, be convicted? It is true an agent can not excuse himself from criminal liability because of doing the act in course of his agency; but, under the facts of this case, has the law been violated? Could Blackwood, the principal, be held liable or guilty of any offense, under said statute, for *purchasing* liquor? If not, *a fortiori*, Blackwood's agent can not.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—Defendant, at the request of one Blackwood, whom he knew to be a person of intemperate habits,

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received from him one dollar, and under his promise that defendant might have any surplus of the money, bought of a dealer in liquors one bottle of whiskey, and carried and delivered it to Blackwood. Being indicted and convicted for this, under section 4205 of the Code of 1876, defendant here insists that the circuit judge erred in charging the jury that upon evidence of these facts, and of the venue, they should find the defendant guilty.

The statute declares, that "any person, whether with or without a license, who shall sell or give away spirituous, vinous or malt liquors, in any quantity whatever, to minors, or persons of known intemperate habits, except," &c., shall be fined, &c.

The rule is, that penal laws are not by construction to be made to embrace cases not plainly within their meaning. "In nothing," (said TILGHMAN, C. J.) "is the common law which we have inherited from our ancestors, more conspicuous, than in its mild and merciful intendment towards those who are objects of punishment."—*Com. v. Duane*, 1 Binney, 601. One who commits an act which does not come within the words of a penal statute, according to the general and popular understanding of them, when they are not used technically, is not to be punished thereby, merely because the act contravenes the policy of the statute.

The purpose of the enactment under consideration is obvious; and the construction put upon it by the circuit judge, tends to carry out that purpose. But it does so, we think, by extending the statute to a case not within its terms, as they are generally understood, and not within the mind of the legislature that enacted it. It might be argued, certainly, that one who takes the money of another, and buys a bottle of whiskey with a part of it, (though it is not shown whether this defendant paid a part of the money only or all of it for the bottle of whiskey), and then delivers it to the person from whom the money was received, in effect, *sold* the whiskey to him. But this is putting upon the word *sold*, a strained interpretation.

The instance proved was not within the contemplation of the law makers, and not provided for by them. No liquor was *given away* by any body. The real seller, was the dealer in liquors of whom the whiskey was bought. And the defendant, in getting it, was but the agent of Blackwood, the purchaser. And if he were known, as such, to the real seller, the latter would be the person who ought to be indicted.

Let the judgment be reversed and the cause remanded.

McGehee v. The State.

Indictment for Trespass.

1. *Indictment against two defendants; variance; jeopardy.*—If an indictment charges that two defendants committed one and the same offense, at the same time, they can not be convicted on proof showing that each committed the offense charged, at different times. And when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment, and is entitled to a verdict of acquittal of that offense.

2. *Nolle prosequi; when not authorized; reversal.*—The provisions of section 4187 of the Code of 1876, do not, in such cases, authorize a *nol. pros.* as to one of the defendants, so that the case may proceed against the other. If a *nol. pros.* be so entered against the objection of the remaining defendant, who is convicted, the conviction will be reversed.

APPEAL from the Circuit Court of Coffee.

Tried before Hon. H. D. CLAYTON.

The appellants, Ed. McGehee and Tod Hutchinson, were charged with "wilfully and maliciously committing a trespass on the lands of one John S. Wilson, by severing from the freehold produce thereof, to-wit: six water-melons, under such circumstances as would render the trespass a larceny, if the six water-melons so severed and carried away had been personal property," &c.

The evidence produced on the trial was, that "some time in October, 1876, Ed. McGehee went into prosecutor's field and pulled a water-melon from the vine and ate it in the field." That "on another day subsequent to the time mentioned, the other defendant, Tod Hutchinson, went into the same field and pulled another water-melon, and ate it in the field."

The solicitor was then allowed to enter a *nolle prosequi* as to Tod Hutchinson, to which the other defendant excepted. The court, at request of solicitor in writing, charged the jury that "if they believed the evidence, they must find the defendant, Ed. McGehee, guilty," to which said defendant excepted, and asked the court to give the following charge: "That if the jury believed, from the evidence, that the offenses committed by the defendants were separate and distinct, and if both of the defendants did not participate in one offense, then they must acquit," which the court refused to give, whereupon the defendant now appeals to this court.

J. E. P. FLOURNOY, for appellant.—1. There was a mis-
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joinder of offenses in the indictment, and a misjoinder of parties defendant—*Elliott v. The State*, 26 Ala. 78; *Lindsay et al. v. The State*, 48 Ala. 169. If the facts of the offenses had been stated in the indictment, it would have been demurrable.—*Elliott v. State, supra*.

2. Allowing the *nol. pros.* to one of the defendants, was equivalent, under the circumstances, to an amendment of the indictment, and was error. The defendants were both entitled to a jury and verdicts.

3. If the Supreme Court reverses it will not remand, but will render proper judgment, discharging the defendants.—51 Ala. 387.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—If it had been averred in this indictment that the two defendants had committed separate and distinct offenses, at different times—neither being present or participating in the offense of the other—a demurrer to the indictment would have lain, notwithstanding the two offenses charged are identical in character. This, on the well defined ground, that on such trial, it would be necessary to offer proof of two independent transactions; thus producing inextricable confusion of the minds of the jurors.—*Elliot v. The State*, 26 Ala. 78; *Lindsey v. The State*, 48 Ala. 169.

On like principles, if two offenders be charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or places—in other words, that they are not guilty of one and the same offense—the proof does not sustain the indictment. Only those persons who participate in the same offense should be joined in one indictment.—*Lindsey v. The State, supra*.

In the present case, according to the recitals in the bill of exceptions, each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial, each defendant was placed in legal jeopardy, and was entitled to have a verdict of the jury on the question of his guilt, in the absence of some statutory or legal ground, authorizing a *nolle prosequi*, or other withdrawal from the jury, that another indictment might be preferred, or continuance granted.—Code of 1876, §§ 4893-4, 4908, 4817. This case does not fall within the healing provisions of the section last cited—*The State v. Kreps*, 8 Ala. 951.

There being no statute authorizing the entry of a *nolle prosequi* to cure the defect which was developed on this trial, the

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Circuit Court erred in its allowance. This ruling is decisive of the present prosecution. The defendants having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, must be allowed the benefit of the verdict they were entitled to, and can not be again tried for the same offense.—*Henry v. The State*, 33 Ala. 389; *Ned v. The State*, 7 Por. 187; *McCauley v. The State*, 26 Ala. 135; *Ex parte Vincent*, 43 Ala. 402.

Reversed, but not remanded, and the defendants ordered to be discharged.

Powell v. The State.

Indictment for Arson.

1. *Competency of witness; when wife may testify.*—The wife of one not on trial or indicted, is not incompetent to testify against defendants because her husband had also testified and his testimony tended to show him an accomplice of defendants.

2. *Examination of witness; discretion of court.*—Where the jury, after retirement, disagree as to the testimony of a witness, it is within the sound discretion of the court to allow them to return and examine the witness in the presence of the court, as to what he had previously testified; and the exercise of this discretion will not be reviewed on appeal.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

Defendant, Henry Powell, and others, were indicted and convicted of burning a gin-house, with valuable cotton therein. On the trial, the State introduced one Phillis Collins, whose examination on her *voir dire*, showed her to be the wife of one Milton Collins, who had already testified. Defendants objected to her as incompetent, because her husband's testimony tended to show that he was connected with the crime as an accomplice. The court overruled the objection, and the defendants excepted. After the case had been left with the jury, and they had retired for an hour or more, they obtained permission to return to the court-room for information, and, upon returning, stated to the court that they had disagreed as to the evidence or testimony of one T. B. Harman, a witness for the State. The court remarked that as Mr. Harman was present he might repeat his testimony in reply to their questions. They then examined the witness as to matters to which he had first testified. The counsel were not permitted to examine witness. The

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defendant objected to this proceeding, but was overruled and excepted. He now appeals to this court upon the record.

POWELL & POWELL, and TOMPKINS & FEAGAN, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—The testimony of Phillis Collins, offered for the State, was objected and excepted to, because her husband, Milton Collins, had testified against the defendants, and his testimony tended to show that he was an accomplice in the arson with which the defendants were charged. Milton Collins was neither indicted, nor on trial, and Phillis was offered to prove separate facts, alleged to be within her knowledge, but not to corroborate the testimony of her husband. No argument or authority is produced to show Phillis' incompetency, and we can perceive no reason why she should have been excluded.

Nor is there anything in the objection that the witness, Harman, was allowed to repeat to the jury his testimony previously given. The jury had returned to the court, and stated they disagreed as to what this witness had testified before them. The witness being in court, the court permitted the jury to examine him; but confined the examination to a repetition of what he had previously testified. Counsel on neither side were allowed to interrogate the witness in this examination. It has uniformly been held in this court that examinations, such as the above, are within the sound discretion of the court trying the case, and will not be reviewed in this court.—*Gayle v. Bishop*, 14 Ala. 552; *Wesley v. The State*, 52 Ala. 182; 1 Greenl. Ev., § 431; *Borland v. Mayo*, 8 Ala. 104; *Fant v. Cathcart*, *Id.* 725.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

[Pickens v. The State.]

Pickens v. The State.

Indictment for Larceny of a Horse.

1. *Indictment; what does not vitiate.*—An indictment is not vitiated because the character & is used instead of the word *and*.

2. *Oath to petit jury, sufficient recital of.*—A recital in the judgment entry, that thereupon came, &c., “who, being duly elected, tried, and sworn, well and truly to try the issue joined between the State of Alabama and the prisoner at the bar, on their oaths say,” &c., held insufficient and a reversal entered; but upon further consideration by the court the sufficiency of such recital is sustained upon the authority of former decisions.

APPEAL from the City Court of Selma.

Tried before the HON. JONATHAN HARALSON.

The appellant, Ed. Pickens, was indicted for the larceny of a horse, the personal property of one Wm. A. Gay. The judgment entry recites that “this day came the State of Alabama, &c., . . . and the defendant demurs to the indictment in this cause, on the ground that the character &, between the words “took” and “carried,” does not represent the word “and,” and that the words “carried” and “horse” are not so spelled out as to certainly appear what they are, and the court having considered said demurrer, it is ordered that the same be overruled. And then the defendant pleaded not guilty; and thereupon came, also, a jury of good and lawful men, to-wit, W. D. Clarke, and eleven others, who, being duly elected, tried, and sworn, well and truly to try the issue joined between the State of Alabama and the prisoner at the bar, on their oaths, say: ‘We, the jury, find the defendant guilty, as charged in the indictment.’”

JOHN C. REID, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—1. We have inspected the original indictment transmitted with the record, under an order of the City Court, and we concur in the opinion of that court, that the objection to it of illegibility cannot be sustained. Nor is there such uncertainty or obscurity as to the words intended, as would have justified the hearing of evidence in reference to them.—*Sayres v. State*, 30 Ala. 15. The sign &, for *and*,

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has been used in practice too long for a court now to entertain an objection to its employment.

2. The oath administered to the jury is not that prescribed by the statute, and this, under repeated decisions of this court, compels a reversal. The judgment must be reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

Per Curiam.—Since the delivery of the foregoing opinion, we are satisfied that we fell into error in declaring the oath administered to the jury was insufficient, requiring a reversal of the judgment of conviction. The oath seems to have been in form and words, that which was declared sufficient, in *McNeil v. State*, 47 Ala. 598; *Edwards v. State*, 49 Ala. 334; *Bush v. State*, 52 Ala. 13; *Blair v. State*, 52 Ala. 343; *Atkyns v. State*, MSS.; *Moore v. State*, 52 Ala. 426. The judgment of reversal heretofore rendered at the present term, in this cause, must be set aside and vacated, and a judgment of affirmance entered, which will be certified to the City Court, and the certificate of reversal heretofore issued, recalled.

Thomas v. The State, *ex rel.* Stepney.

Information against Attorney-at-Law for Professional Misconduct.

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113	405
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1. *Proceedings to remove attorney; information.*—The statutory proceeding for removing an attorney, under section 882 R. C., is in the nature of a criminal proceeding, and an information under such section must disclose with certainty the facts of misconduct, and that the defendant is amenable to the proceeding.

2. *Directed only against licensed attorneys.*—The statute is directed only against attorneys who are regularly licensed under the laws of this State, who have taken the oath prescribed, and not against attorneys temporarily practicing in the court by mere comity.

3. *Averment; uncertainty of; defect raised first time in Supreme Court.*—An averment in the information that the defendant "hath been, and now is, an attorney practicing in the courts of the State of Alabama, in the county of Dallas," may apply either to a licensed attorney or one without license, practicing temporarily by comity, and is for that reason uncertain in statement, and such want of certainty, being a defect of substance fatal to a judgment rendered thereon, may be raised for the first time in the appellate court.

4. *Amendment; when allowable.*—The statute of amendments is very broad and comprehends all pleadings except indictments (R. C. § 2657), and will authorize an amendment of the information, which, though *quasi* criminal, is the act of the relator as essentially as is the complaint in a civil action.

5. *Removal of case to U. S. Court; when properly denied.*—In the absence of any hostile legislation, regulation or custom of the State interfering with the

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full rights of defendant in the City Court of Selma, he can not have his cause removed to the Circuit Court of the United States because he is a negro; the act of Congress (Rev. Stats. § 641) does not authorize a removal under such circumstances.

APPEAL from City Court of Selma.

Tried before Hon. JONATHAN HARALSON.

JOHN C. READ, RICE, JONES & WILEY, and BRAGG & THORINGTON, for appellant.—1. The proceeding against appellant is *quasi* criminal.—See *Matter of Hamilton Baluss*, an Attorney, 28 Mich. 507, 508; *Cumming v. The State of Mo.*, 4 Wall. 279; *Ex parte Garland*, p. 333. And being *quasi* criminal in its nature, it can not be maintained against any person, save a *licensed attorney*.—Code, § 861-883. This being the case, the information is defective in failing to charge that the accused is a *licensed attorney*.—See *Withers v. The State, ex rel. Posey*, 36 Ala. 260, 261. If the accused had been a non-resident lawyer, then the information should have charged that he was a *licensed attorney* in the State in which he resided, because no other non-resident attorney can practice in the courts of this State and be amenable to this mode of proceeding.—Code of 1876, § 814; 20 Am. Rep. 55-57. And as this defect would have been fatal on demurrer or arrest of judgment, it is available in this court on appeal, as if the objection had been raised below.—*Cosky, Sheriff, &c. v. The State*, 6 Ala. 194, 195; *Herring v. Glisson*, 2 Dev. (N. C.) 160; *United States v. Cook*, 17 Wall. 174. Informations, like indictments, must allege the offense with accuracy and fullness.—10 Ind. 404; and must charge with positive distinctness every essential fact demanding a forfeiture of valuable vested rights.—4 Moss, 462; 3 Day, 103; 4 Bl. Com. 308; *United States v. Cook*, 17 Wall. 174.

2. Being of a criminal nature, the information should not have been amended, as allowed.—*Gregory v. The State*, 46 Ala. 151; 4 Bl. Com. 308; 1 Dana (Ky.), 466, 595.

3. We insist that the judgment of the court below should be reversed, and that the cause should not be remanded.—*Cosky, Sheriff, &c. v. The State*, 6 Ala. 194, 195.

4. It was error to refuse the petition of appellant to remove the case into the Circuit Court of the United States, for the 5th Judicial Circuit, and Middle District of Alabama.—See § 641 Rev. Stat. U. S.; *Gordon v. Longest*, 16 Pet. 97; *Lankford's Adm'r v. Barrett*, 29 Ala. 700; *State v. Dunlap*, 6 Am. Reps. 746.

JOHN P. TILLMAN, *contra*.—1. The petition for the removal of the cause to the United States Circuit Court is based on
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the Civil Rights Act of April 9, 1866, (14 U. S. Stat. p. 27; Rev. St. § 641,) and sets out as grounds therefor, that by reason of the appellant's race and color, and his republican politics, he could not have as full and equal protection under, and benefits of the State laws, in this proceeding, as could a white man; and that the public prejudice against him, for said causes, was so great, that it would be impossible for him to obtain a fair and impartial trial in said City Court.

We deem it scarcely necessary to discuss the correctness of the ruling of the court below on this petition; and will only cite the court to the case of *The State of Texas v. Gaines*, 2 Woods' Rep. 342, which is decisive on this point. The opinion in that case was delivered by Bradley, J., and is well considered.

2. The minutes and docket entries were properly admitted in evidence for the purpose of showing, that the prosecution against relator was pending in the Circuit Court as stated in the information. How else could the fact be proved? The original papers before the justice of the peace were also properly admitted in evidence to show the character of the proceedings against relator, as charged in the information. How else could this fact have been proved?

3. The amendments allowed to the information were entirely formal, and, we might say, immaterial in their character. In *Murry v. Harper*, 3 Ala. 744, the court say: "Every court, whether of general or limited jurisdiction, has the power to permit such amendments to be made in the pleadings, while the cause is *in fieri*, as will enable it to fulfil the end of its creation, the administration of justice." See, also, *Dothard v. Teague*, 40 Ala. 583. An affidavit for an attachment can be amended in formal or immaterial matters.—*Sims v. Jacobson*, 51 Ala. 186.

4. Informations, so far as amendments are concerned, are not governed by the same rules as indictments. An indictment is a *finding by a grand jury*; but an information is the *act of the pleader only*.

"An information may be amended at any time before trial, even before a single judge at chambers, because no *finding of a jury or principle of right is affected*."—1 Chitty's Crim. Law, m. p. 842; Ib. p. 865.

5. The relator testified that his true name was Robert Robinson, but that he was rarely called by the latter name; that he was frequently called Robert Stepney. The proceedings before the justice, was against relator by the name of Robert Stepney. He is a negro and doubtless has several names. But, on examination of the testimony, it will be found that the name by which he was most generally known was Robert

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Stepney. He signed the information by that name; he signed the affidavit by that name, and his wife testified that his name was Robert Stepney.

If the relator be held not a party to the information, then the name is wholly immaterial. If, on the other hand, the relator is held to be a party, then the appellant should have filed a plea in abatement setting up the misnomer.—Chitty on Plead., vol 1, m. p. 248. And if this had been done the information could have been amended. But then the plea would not have been sustained by the evidence on a proper replication.

6. Unless error is to be found in some of the rulings of the court below, above noticed, this court can not say that there was error in the finding of the judge and the judgment he rendered thereon, because the evidence set out in the bill clearly establishes the charges, and further, the bill of exceptions does not pretend to set out all the evidence.

In such a case as this, unless the bill of exceptions fails to show that the evidence set out therein is all the evidence, this court will not disturb the *finding* of the court below.

BRICKELL, C. J.—This was an information, charging the defendant with misconduct in his profession, as an attorney-at-law, and seeking his suspension or removal from the office of attorney, because of such misconduct. It is founded on the statute, Revised Code, § 882. The proceeding, though not strictly criminal, is of the nature of a criminal proceeding, and it is essential to support it, that the information should with certainty disclose that the defendant is amenable to the proceeding, and the facts constituting the misconduct of which complaint is made. It is apparent, the statute is directed only against attorneys who are regularly licensed under the laws of this State, and who have taken the oath prescribed, “not to violate any of the duties enjoined on him by law.” There may be attorneys, by the comity of the courts, practicing in this State, yet without a license, and without having taken the oath the statute prescribes. The courts permitting them to practice have, while the attorney is before them, an inherent power to compel obedience and fidelity to the duties he voluntarily assumes, as they have to compel it from all their officers. These can not, and it is not intended they should be proceeded against under the statute. They fill no permanent official relation to the courts, or to the community. Their relation is temporary, and the comity which permits it may at any time be withdrawn, without offending any right the law protects. An attorney who has been regularly licensed, occupies a permanent official rela-

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tion to the courts in which he has authority to practice, and to the community. The license confers on him a right to practice his profession, of which he can not be deprived without misconduct on his part, judicially ascertained and declared; a right conferred by law, not a matter of grace which courts may at pleasure recognize or withhold.

The averment of the information is, that the defendant "was on the first day of January, 1876, and thence hitherto hath been and now is, an attorney practicing in the courts of the State of Alabama, in the county of Dallas." In *Withers v. State*, 36 Ala. 252, which was an application by an attorney for a *mandamus* to compel an inferior court to permit him to appear as counsel in causes in which he had been employed, the averment was that the relator "is a practitioner of law in all the courts of this State, both of State and federal jurisdiction," and it was held an insufficient averment of a legal right to practice in the courts of this State. The court say, "We do not think that this is a sufficient allegation of his legal right to practice in the courts named. It is not alleged, nor was it shown on the hearing of the application, that the relator was regularly licensed under the laws of this State before the adoption of the Code, or that he had since that time been admitted by a license from a court competent to grant it, and had taken the oath prescribed." The present averment is equally insufficient. Every fact stated may be true, and the defendant, without having a license from any court authorized to grant it, and without having taken the oath prescribed, may, by the mere comity of the courts of Dallas county, have been permitted to practice therein. It certainly is not an averment that he is an attorney having a license which creates between him and those courts a permanent relation, and confers on him a legal right to practice therein. An information of this character, on which, if judgment is pronounced against a defendant, a deprivation, temporary or permanent, of a legal right, is the consequence, and which involves moral turpitude, and a breach of official oath, must be clear and definite in its averments. If it is wanting in the certainty of statement, that will inform the defendant of the particular offense he is called to answer, or, if on a verdict of guilty it will not certainly appear the jury are warranted in their conclusion, or the court, looking to the information and verdict, can not see clearly that the defendant is subject to the penalty the law prescribes, it is insufficient. The court can not on this information say, whether the judgment of suspension was pronounced against a licensed attorney, subject to the judgment, or an attorney pursuing his profession in the courts of Dallas county, by

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the comity of those courts, and not subject to such judgment. On such an information no judgment should have been pronounced against the defendant.

Objection to the sufficiency of the information on this ground, is made for the first time in this court, after demurrer, and answer, and a trial before a jury in the city court. The statute is: "No judgment can be arrested, annulled or set aside, for any matter not previously objected to, if the complaint contain a substantial cause of action."—Rev. Code, § 2811. The provision is applicable to all proceedings, other than strictly criminal prosecutions by indictment. A case is not within its influence, unless the pleading which stands in lieu of the complaint in ordinary civil suits, discloses a case of which the court has cognizance, and facts on which the court could properly render judgment by default, if the defendant failed to appear. Insufficiency in this respect is of substance, and is fatal on error.

Though the proceeding is in its nature criminal, the pleading originates with, and is the act of the relator, as essentially as is a complaint, in an action purely civil. The statute of amendments is very broad in its language, and comprehends all pleadings, except indictments.—R. C. § 2657. The insufficiency of the information may be cured by amendment in the city court, if the facts warrant it.

The application of the relator for a removal of the cause to the Circuit Court of the United States was properly denied. It fails to disclose any hostile legislation of the State, interfering with his full right of defense in the City Court. In the absence of such interference with, or denial of his rights, by such legislation, or by some regulation or custom of the State, the act of congress (§ 641 Rev. Statutes) does not authorize a removal.—*In re* Petition of Walls *et als.*, Albany Law Journal, Feb. 9, 1878.

For the insufficiency of the information in the respect pointed out, the judgment must be reversed and the cause remanded.

[Sanders v. The State.]

Sanders v. The State.

Indictment for Retailing Liquor without License.

1. *Statute on retailing not repealed by revenue law.*—Section 3618 of the Revised Code, prohibiting the retailing of spirituous liquors without license, is not repealed by the Revenue Act of 1868, punishing "engaging in, or carrying on, the business of retailing" without license.

2. *Retailing without license, one act sufficient; not so with "engaging in business," &c.*—Under an indictment for retailing without license, a single act of unlawful retailing will sustain a conviction, while the "engaging in or carrying on the business of retailing," is a different offense, and requires more evidence.—See *Martin's case*, present term.

3. *Charge to find guilty; when should not be given.*—A charge that "if the jury believe the evidence, they must find the defendant guilty," should not be given where the evidence is conflicting, or where, upon the evidence, the jury could legally acquit the defendant.

APPEAL from the Circuit Court of Pike.
Tried before the Hon. H. D. CLAYTON.

No record came to hand of Reporter.

PARKS & HUBBARD, for appellant.

Attorney-General, J. W. A. SANFORD, *contra*.

MANNING, J.—Several decisions in this court have settled that section 3618 of the Revised Code of 1867, was not repealed by the Revenue Act of 1868.—See them referred to in *Martin v. The State*, (of this term). Under the section referred to, it is held that a defendant can be convicted upon proof of a single act of retailing spirituous or vinous liquors without a license; while "the engaging in or carrying on the business of retailing" spirituous or vinous liquors without a license, is held to be a different offense, requiring more evidence to establish it. The demurrer was, consequently, properly overruled.

For the same reason, there was no error in the refusal of the circuit judge to give the charge requested on behalf of the defendant, to the jury.

But there was error in the charge given to the jury at the instance of the solicitor, "that if they believe the evidence, they must find the defendant guilty." Such a charge should not be given, if, upon the evidence in the cause, the jury could

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legally find a verdict in favor of the accused.—*Walker's Adm'r v. Walker's Adm'r*, 41 Ala. 358; *Freeman v. Scurlock*, 27 Ib. 407; 1 Brick. Dig. 335.

In the present cause, the testimony was conflicting enough to make the jury pause to consider well, which of the witnesses were most entitled to credence, for, if they should believe the two for the defense, it would not be easy to believe, also, the witness for the prosecution. Yet, in such a state of the evidence, the jury would be very apt to understand the instruction—"that if they believe the evidence, they must find the defendant guilty,"—as equivalent to the charge, that there was nothing in the testimony of the witnesses for the defendant, though the jury should believe it all to be true, which was inconsistent with that of the witness against him, or which tended to show that the accused was not guilty.

Upon the evidence set forth in this record, the instruction given at the request of the prisoner was erroneous.

Let the judgment be reversed and the cause remanded.

Snow et al. v. The State.

Indictment for Burglary.

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1. *Presence of prisoner during trial; sufficient showing in judgment entry.*—When the record discloses that the trial, verdict, imposing sentence, and rendition of judgment, was a continuous transaction, at all parts of which the defendants were personally present, and it is expressly stated that on the return of verdict of guilty, the defendants were in court and were each asked if he had anything to say why the sentence of the law should not be pronounced, &c., it sufficiently appears that the prisoners were personally present during all the stages of the trial, and also when sentence was passed and when judgment was rendered.

2. *Duty of the judge in admitting or excluding evidence.*—It is the duty of the presiding judge, if satisfied that he has illegally admitted or excluded evidence, to correct the error during the trial by withdrawing from the jury evidence improperly admitted, or by admitting evidence improperly excluded, and such action of the court is not error if its final ruling is correct.

3. *Evidence that another alone committed the offense.*—The defendants may show that another committed the offense instead of themselves, but such defense cannot be made out by mere unsworn declarations of such other, who was not a witness, to the effect that he committed the offense, and that the prisoners are innocent. Such evidence is mere hearsay of the most dangerous character.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

The indictment in this case was against Daniel Smith,
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Frank Snow, and Elbert Smith, but the last two only were on trial. After the State had concluded its evidence the defendants examined one Henry Smith, and asked him if he knew the defendant Daniel Smith, who was not on trial, to which witness answered that he knew him. Defendants then asked witness if he ever heard said Daniel Smith say who broke open the lint room of Mr. Hall's gin house? (the house charged in the indictment). Witness replied that "he did." The solicitor objected to this testimony, but was overruled. Witness then being told to state what said Daniel Smith said about it, went on and said that he heard said Smith say that he broke open said lint room, and that Frank Snow and Elbert Smith are innocent; that after he broke open the lint room and took out the cotton he hired Frank Snow and Elbert Smith to haul the cotton away for him. Another witness, one Ed. Skinner, was introduced by defendants, who gave the same testimony. The solicitor again objected to such testimony, but was overruled. Afterwards, and before the testimony had closed, the court, on motion of the solicitor, excluded from the jury all of the testimony of said witnesses, so far as it gave the declarations of Daniel Smith, to which ruling the defendants excepted.

The defendants now appeal to this court on the following assignments of error:

1. The record does not show that the defendants were in court when sentence was passed upon them.
2. The court erred in ruling out the testimony of said Henry Smith and Ed. Skinner.
3. The court erred in excluding the declarations of Daniel Smith.
4. The court erred as shown by the record.
5. The court erred as shown by the bill of exceptions.

S. J. CUMMING, for appellants.—1. The record does not show that the defendants were in court when sentence was pronounced. "In capital cases and other felonies there are some matters that must affirmatively appear in the record, or the conviction will be erroneous and the judgment of the court must be reversed." It is equally true that the same rule must be applied in the passing of sentence by the court. I refer to the following cases as showing the great strictness required in such cases:—*Perry v. The State*, 45 Ala. 24; *Slocovitch v. The State*, 46 Ala. 227; *Johnson v. The State*, 47 Ala. 9; *Mullen v. The State*, 45 Ala. 44.

2. The evidence of Harry Smith and Ed. Skinner should not have been excluded from the jury. The case of *Walter Snow v. The State*, December term, 1875, is different from

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the one at bar. There the declarations ruled out were made by one who was not a party to the indictment, and were made in the absence of the accused. Here the declarations were made by a co-defendant, and it does not appear that they were made in the absence of the defendants on trial. It is laid down in *Rosc. Cr. Ev.* p. 22, "Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible, as in *Crutchley's case*, 5 Carr. & P. (24 Eng. C. L. Rep. 244.)"

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—1. The record discloses that the trial, verdict, imposing sentence, and rendition of judgment, was a continuous transaction at all parts of which the defendants were personally present. It is expressly stated that on the return of verdict of guilty, the defendants were in court, and were each asked, *if he had any thing to say, why the sentence of the law should not be passed upon him, and he had nothing to say*—the sentence and judgment immediately following. We cannot agree with counsel that it does not necessarily follow in the face of this recital that the defendants were in court, not only when the verdict was returned, and when they were asked if they had anything to say why sentence should not be passed, but also, when sentence was passed and judgment was rendered. It was not necessary to affirm their continuous presence, at each step in the cause, especially when the only authority to depart from the court, succeeds the sentence and judgment, in an order to the sheriff to take them to jail, and thence to the penitentiary, in execution of the sentence and judgment.

2. There is no reason to doubt, that if the judge of the Circuit Court, inadvertently, or from error of judgment, after argument, admitted illegal evidence, or rejected legal evidence, and during the trial, became satisfied of his error, that it was not only his right, but his duty, to correct the inadvertence or error, by withdrawing from the jury the illegal evidence, or admitting for their consideration the legal evidence. Whether the inadvertence or error was favorable or adverse to the accused in a criminal prosecution, is not a test of the right and duty of the judge. The law favors the accused in all criminal prosecutions, and extends to him many rights and advantages the courts are careful to maintain, though they may seem in the particular case, to embarrass the administration of justice. Of these, however, is not the right to compel the court, during the trial, to persist in

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the error of admitting for him illegal evidence, or of rejecting legal evidence against him. The error of the court in admitting, or rejecting, does not change the character of the evidence.

3. It was certainly proper for the defendants to show, that if the offense had been committed, Daniel Smith, jointly indicted with them, but not on trial, was the guilty agent in its commission, and that they were free from all guilty connection with it. This must, as must any other material fact, have been shown by legal evidence. Smith's declarations of his guilt, and of the innocence of the defendants, certainly seem evidence of great weight in favor of the defendants. But suppose it is admitted, and in the judgment of the jury, outweighs the evidence against the defendants, and they are acquitted? Smith is arraigned for the offense, and proves the declarations of the prisoners, that they committed the offense, and he is free from all complicity with it. Each, by the mere verbal declarations of the other, in the absence of all opportunity for cross-examination, has afforded evidence which results in their mutual exculpation. Or, the defendants having been acquitted, protected by the justice and the humanity of the law from further prosecution, could become witnesses for Smith, proving their guilt and his innocence. Or, suppose Smith is arraigned, and shows, as it would be his right to show, that the witnesses misunderstood his declarations, or that they were carelessly, and loosely made, and are, in fact, untrue, unless connected with other evidence of guilt, his acquittal must follow. Such declarations are hearsay evidence, the weakest, most uncertain, and most dangerous, and were by the court properly rejected.—*Smith v. State*, 9 Ala. 990.

We find no error in the record, and the judgment must be affirmed.

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Dawkins v. The State.

Indictment for Carnal Abuse of Female Child.

1. *Meaning of the term "abuse," in the statute.*—The term "abuse," in the statute (Code of 1876, § 4306), punishing carnal knowledge, or abuse in attempting to have carnal knowledge, of female child under ten years, must be limited in its meaning to injuries to the genital organs, in the attempt at carnal knowledge, falling short of actual penetration; it was not intended to mean other forcible or wrongful ill usage, such as might support an indictment for an assault with intent to ravish.

APPEAL from the Circuit Court of Dale.

Tried before the Hon. H. D. CLAYTON.

The appellant was indicted for having carnal knowledge of "or abuse in the attempt to carnally know Cora Blackshear, a female under the age of ten years." The defendant was a negro boy about twenty-one years of age, and Cora, a little white girl, aged about seven years. There was no evidence that defendant did have carnal knowledge of said Cora.

The court, among other things, charged the jury that "the word 'abuse' was not synonymous with the word 'injure,' but meant to '*forcibly use wrongfully*,'" to which the defendant excepted.

The defendant then asked the court to charge the jury that "if the evidence failed to show that the defendant *injured* Cora Blackshear, in the attempt to have carnal knowledge of her, by bruising, cutting, lacerating, or tearing in or on some part of her person, the defendant could not be convicted of the offense charged in the indictment," which charge the court refused; and the rulings of the court upon said charges are now assigned as error.

W. D. ROBERTS, for appellant. (No brief came to Reporter.)

J. W. A. SANFORD, Attorney-General, *contra*.—1. In section 3663 of the Rev. Code, two offenses are defined. One is to have carnal knowledge of a female under the age of ten years; and the other is the "abuse of such female in the attempt to have carnal knowledge of her." For the violation of this section, the accused was properly indicted.—Wade's case, 52 Ala. There was no testimony that proved the first offense, but he was convicted of the second.

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2. What is meant in this section by the word "abuse?" The court defined it to mean, "to forcibly use wrongfully." To this definition, the accused excepted. But the definition is too favorable to the prisoner. "Abuse" does not necessarily imply *force*, while it does imply *wrong*. Now, the whole section excludes *force* as an element of the crimes punished by it.

3. The female may not only have been willing, but may have solicited the illicit intercourse, and the man would, under this section, have been none the less guilty of the offense first mentioned in it. If *force* be not an ingredient in the consummated offense, it can scarcely be supposed the legislature intended it should be an ingredient in the mere attempt to commit it.

4. Webster, in his dictionary, defines "to abuse" to mean, "to use with bad or improper motives;" "to defile by improper intercourse;" "to maltreat;" "to use ill." In all these significations, *force* is nowhere involved or implied. Therefore, the accused cannot complain of the definition of the term "abuse," given by the court, because it was an error that did not cause any injury. And for the same reasons the court very properly refused to give the charge asked by the prisoner.

5. Again, the bill of exceptions contains no evidence, and as charges are construed in regard to the evidence, the court can not determine that the court below erred by its refusal. Moreover, the charge was not in writing, and, therefore, the refusal to give it was proper.

BRICKELL, C. J.—The indictment, in the form prescribed, charges that the defendant "did carnally know, or abuse in the attempt to carnally know," a female child under the age of ten years. It is founded on the statute (Code of 1876, § 4306), which reads as follows: "Any person who has carnal knowledge of any female under the age of ten years, or abuses such female in the attempt to have carnal knowledge of her, must, on conviction, be punished, at the discretion of the jury, either by death, or by imprisonment in the penitentiary for life, or by hard labor for the county for life." The Circuit Court was of opinion, and so instructed the jury, that the word *abuse*, as found in the statute, was not the synonym of *injure*, but signified *to forcibly use wrongfully*. The correctness of the instruction is the only matter presented for consideration.

Rape, as defined by Blackstone, is "the carnal knowledge of a woman forcibly and against her will."—4 Black. 210. A better definition, Mr. Bishop suggests, is, "rape is the

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having of unlawful carnal knowledge by a man of a woman, forcibly, where she does not consent.”—1 Bish. Cr. Law, § 1115. A distinct offense, though punished with like severity, was the carnal knowledge and abuse of a female child under the age of ten years. Force, overcoming the resistance of the woman, if she was not an idiot, or subdued by fraud, or rendered unconscious by the administration of drugs, medicines, intoxicating drinks, or other substances, was an indispensable element of the offense of rape. The consent of the woman, yielded at any time before the act of penetration was complete, relieved the offense of its felonious character. Of the latter offense, the carnal abuse of female children, under ten years of age, the wrongful act involved all the force which was a necessary element of the crime; and the consent, or non-consent of the child, was immaterial. The English statute of 13 Eliz. c. 7, directed against the offense, is substantially as follows: “That if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof, being duly convicted, shall suffer as a felon without allowance of clergy.” The present statute, 24 and 25 Vict. c. 100, § 50, employs the terms “carnally know and abuse any girl under the age of ten years.”—Bish. Stat. Crimes, § 489. In this country, statutes have been enacted in nearly all, if not all, of the States, punishing the offense, and generally describing it, as in the English statutes, by the words “unlawfully and carnally know and abuse any woman child under the age of ten years.” Several of these statutes are to be found in 2 Whart. Am. Cr. Law, §§ 1124, 1132. It is perhaps true, as suggested by Mr. Bishop, that in these statutes, *carnally know*, includes in its meaning all that is signified by the word *abuse*.

There cannot be sexual connection between a male capable of committing rape, and a female child, under ten years of age, without injury to the private parts of the child.—Wharton & Dille’s Medical Juris. § 432. The statutes to which we have referred are directed against the complete offense—when there is something more than mere outward contact of the genital organs—something which may be called penetration.—Bish. Stat. Crimes, § 494. The offense, then, includes, of necessity, physical injury to the child, and it is this injury the term *abuse* includes, though it is included also in the words *carnally know*. Our statute differs from these statutes, and is unlike any to which we have access. It is directed, not only against the offense itself, when complete, but against attempts to commit it, if in the attempt there is *abuse* of the child. Without any contact of the genital or-

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gans—without anything which may be called penetration—there may be injury to the child's sexual organs. It is said that often the chief injury to the child results from the use of the fingers of the male. There have been cases in which, without the contact which would constitute the complete offense, bodily harm has been inflicted by cutting the private parts of the child. An injury to these parts, in the attempt at carnal knowledge, is the *abuse* to which the statute refers, and not to forcible or wrongful ill usage, which would be an element of the offense of an assault with intent to ravish the child. *Abuse* is stated by Webster to be the synonym of *injure*, and in its largest sense signifies ill use or improper treatment of another. Its proper signification must be ascertained by reference to the subject matter or the context, and the meaning of the words with which it is associated. In this statute, intended for the punishment of deflowering female children, it must be limited in signification by the words with which it is connected referring to the same subject matter. The instruction given by the Circuit Court would render the attempt to know carnally and abuse of the child, the equivalent of an assault with intent to ravish, a distinct offense, subject to a different punishment under another statute.—Code of 1876, § 4314. Rape, and its kindred offenses, are the subject of several different statutory provisions, and the punishment for each offense is distinctly described. No one of these statutes embraces the offense which is included in another. The result is, the instruction of the Circuit Court is erroneous, and the judgment must be reversed and the cause remanded; the prisoner will remain in custody until discharged by due course of law.

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Indictment for Murder.

1. *Questions not noticed in detail; affirmed on authorities.*—The questions presented in argument are not considered in detail. The judgment of conviction is affirmed and reference made to *Ex parte Winston*, 52 Ala. 419; *Floyd v. The State*, December Term, 1876; *Craton's case*, 6 Ire. 164; *Boots Coleman v. The State*, present term.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. GEO. H. CRAIG.

The indictment in this case charged that "Albert Young, *alias dictus*, Albert Poole, Silas Wright, *alias dictus*, Bob.

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Jones, and Lucius Porter, unlawfully and with malice aforethought, killed Isaac D. Moore, by shooting him with a gun," &c. Defendants were convicted of murder in the first degree, and sentenced to be hung on Friday, the thirtieth of November, 1877.

On appeal to this court, the defendants assign as error :

1. The foreman of the grand jury was not sworn according to law.
2. The grand jury was not sworn according to law.
3. The record does not show that the prisoners were present in court when the verdict was rendered.
4. The record shows that the jury were sworn on the tenth and last day of the trial.
5. The jury was not sworn according to law.
6. The jury was sworn after they were charged with the case.
7. The jury were sworn after the judge charged them with the law of the case, if they were charged at all.
8. The record fails to show that the jury was charged with the law of the case.
9. The record shows that the defendants were in actual custody, but it fails to show that a copy of the indictment and list of jurors summoned for the trial, were delivered to the prisoners according to law.
10. The court erred in striking W. A. Craig from the list of special jurors.
11. The jury was not drawn according to law.
12. The verdict of the jury was not read aloud by the clerk.
13. The sentence of death was not pronounced according to law.
14. The court did not ask the defendants if they had anything to say why sentence of death should not be pronounced against them.

From the view taken of this case by the court, and from an investigation of the record, it appears that these assignments are not well made.

W. B. MODAWELL, L. N. WALTHALL, and P. B. LAWSON, for appellants.

JOHN W. A. SANFORD, Attorney-General, and CHARLES G. BROWN, *contra*.

STONE, J.—We have carefully considered the many points urged in argument, why we should reverse the judgment of conviction in this case, and the result is that we find no error

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in the record. We consider it unnecessary to notice the questions in detail. See *Ex parte Winston*, 52 Ala. 419; *Floyd v. The State*, 55 Ala. 61; *State v. Craton*, 6 Ire. 164. We have fully considered the charges excepted to, and find no error in them.—*Boots Coleman v. The State*, at the present term.

Affirmed.

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Indictment for Larceny by Finding.

1. *Indictment; when imperfect.*—A count, in an indictment for larceny, which charges that the defendant “feloniously took and carried a bale of lint cotton,” omitting the word “away,” is bad.

2. *Ownership; when property laid in railroad company.*—If cotton is delivered to a railroad company for transportation, such company is thereby vested with special property in it, and, in an indictment for its larceny, it would be sufficient to lay the property in such company.

3. *Circumstances constituting larceny distinguished from trespass; felonious intent.*—It is not every wrongful taking and carrying away, or conversion, that constitutes larceny. Unless the circumstances which surround or attend the act, convince the jury that the intent was felonious, then the act is but a civil wrong. Secrecy in acquiring the goods, attempts at concealment, false denial of possession, are among the evidences which distinguish larceny from trespass.

4. *Charge of court; what erroneous.*—A charge to the jury that if they believe that “a bale of cotton was dropped from the cars of the M. & E. R. R., and that defendants took and carried away said bale of cotton with intent to convert it to their own use, and not with the intent of returning it to the true owner, they are guilty of larceny,” is erroneous, because it ignores the question of felonious intent, without which there can be no larceny.

5. *Circumstances tending to show the owner of goods found.*—Where a bale of cotton had been compressed for shipment, and was found on a railroad track, where there was no crossing, this, unexplained, would tend to show that it must have fallen from the train, and that the finder could easily ascertain who had the special property in it.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case contained two counts, the trial being upon the second count, which was as follows: “The grand jury of said county do further charge that, before the finding of this indictment, Jim Rountree, Monday Rountree, Neil Asbury, John Isaiah, and Aaron Lampley, feloniously took and carried —— one bale of lint cotton, of the value of fifty dollars, the personal property of a person, whose name is to the grand jury unknown,” &c., omitting, as appears from the record, the word “away.”

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100	16
100	22
58	381
125	51

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The evidence tended to show, among other things, that the Montgomery & Eufaula Railroad Company shipped over its road, cotton which had been compressed, and that about the eighteenth of December, 1877, a bale of such cotton fell from the cars in a "cut" about a mile and a half from a public dirt-road crossing, and that said bale was removed to an old shanty about fifty yards distant, and was, subsequently, taken in a cart some distance, where it was found by an employe of said company, in the gin-house of one of defendants. Many stories were told about the cotton, where and how it was obtained, &c., and as to its ownership. The evidence connects all of the defendants with the taking, and appropriation of the cotton. The court, among other instructions, gave to the jury the charge copied in the opinion; and refused two charges asked by defendants upon the question of *abandonment* of the property found. The defendants duly excepted to the adverse rulings of the court, and now appeal from the judgment.

NORMAN & WILSON, for appellants.—1. To constitute larceny by finding, two things must concur: 1st. The finder must, at the time of the finding, feloniously intend to appropriate the property found to his own use; 2d. He must, at the time, either know the owner, or have the means of knowing him, or a reasonable belief that he may be found; and these essential ingredients must be proved by the State beyond a reasonable doubt.

2. The State must show to the satisfaction of the jury, that there were some marks or brands on the property lost, or other indications by which the finder could have ascertained the true owner, which they have failed to do in this case.

3. The charge given, at the instance of the counsel for the State, excluded from the jury the consideration of the question as to whether the defendants knew, or had the means of knowing, the owner of said cotton; and instructed them to convict, if the evidence showed that a bale of cotton had been dropped from the cars of said railroad company, and that defendants took the bale of cotton with no intention of returning it. In this the court erred.—*Regina v. Mole*, 1 Carr. & K. 417; *State v. Conway*, 18 Mo. 321; *Lane v. People*, 5 Gil. 305; *People v. Cogdell*, 1 Hill (N. Y.) 94; 14 Grat. 635-7; *Griggs v. State*, present volume.

4. A person may abandon his property—the goods lost—and it will then vest in him who first takes possession with the intent to appropriate it to his own use. This is not larceny.

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H. C. TOMPKINS, with JNO. W. A. SANFORD, Attorney-General, *contra*.—1. The bill of exceptions pretends to set out all the evidence, and the court will not reverse unless error be affirmatively shown.—*Godwin v. School Commissioners*, 30 Ala. 244, and authorities cited.

2. The rules relating to the larceny of "lost goods" can hardly be applicable to this case. Most of the cases on this subject have been decided where the facts showed that the property was lost on a public highway or in some public place which people have the right and are in the habit of frequenting. Such cases are based upon the idea that the finder might not have known to whom the goods belonged; but in the case at bar the defendants must have known.—See opinion of MANNING, J., in Grigg's case, present volume; 2 Bish. Cri. L. §§ 858, 861.

3. There is no error in the charge given, even though the bale of cotton be considered as lost goods. It was not necessary for the jury to believe that defendants knew to whom the cotton belonged—that fact being only a circumstance to which the jury might look in ascertaining the *intent*, and not a necessary ingredient of the offense.—See opinion of BRICKELL, C. J., in Grigg's case, *supra*.

4. Both of the charges asked and refused were abstract; there was no evidence tending to show that the cotton had been abandoned, and such charges were therefore calculated to mislead, and were properly refused.—2 Brick. Cr. L. §§ 857, 858, and authorities there cited.

STONE, J.—1. The defendants, in the present case, were tried on the second count in the indictment. That count, as found in the transcript, is imperfect. It charges that the defendants "feloniously took and carried a bale of lint cotton." The word 'away' is omitted. This is probably the result of an error in transcribing; but if not, this count of the indictment is bad. If the cotton was delivered to the railroad for transportation, then the road had a special property in it; and in an indictment for its larceny, it would be sufficient to lay the property in the railroad company. *Satterwhite v. The State*, at present term.

2. In 1 Hale, Pleas of the Crown, 508, it is said: "As it is *cepit* and *asportavit*, so it must be *felonice*, or, *animo furandi*, otherwise it is not felony, for it is the mind that makes the taking of another's goods to be a felony, or a bare trespass only; but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various, and may sometimes deceive, yet regularly and ordinarily these circum-

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stances following, direct in the case." In 2 Russ. Cr. 8, it is said: "It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man take away the goods of another openly, before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of trespass, because done openly in the presence of the owner, or of other persons who are known to the owner." See, also, 2 Whar. Amer. Cr. Law, § 1786; 2 Bish. Cr. Law, § 840; *McDaniel v. State*, 8 Sm. & Mar. 401, 418. So in *Spivey v. The State*, 26 Ala. 90, this court said: "To constitute the offense of larceny, according to the common law, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert the thing taken to the offender's use."—See, also, *Wilson v. The State*, 1 Por. 118; *Hawkins' case*, 8 Por. 461. The authorities cited above clearly show that it is not every taking and carrying away of the personal goods of another that constitutes larceny. Nor is the conversion of goods found necessarily larceny. If this were so, then there would be left little or no ground for the civil actions of trover and trespass *de bonis asportatis* to operate upon. Whether the conversion, or taking and carrying away, amounts to larceny, depends on the circumstances which surround, or attend the act. Unless these circumstances convince the jury that the intent was felonious, then the act is but a civil wrong. Secrecy in acquiring the goods, attempts at concealment, false denial of possession, are among the evidences which distinguish larceny from trespass.

3. The charge given in this case, at the instance of the prosecution, is in the following language: "If the jury believe from the evidence that a bale of cotton was dropped from the cars of the Montgomery and Eufaula Railroad, and that defendants took and carried away said bale of cotton with intent to convert it to their own use, and not with the intent of returning it to the owner, then they are guilty of larceny." It will be seen that these are the ingredients of trover and conversion, and that less than this would not justify a verdict for the plaintiffs, were that action brought on the facts shown in this record. It entirely ignores the question of felonious intent, without which there can be no larceny. That question should have entered into the hypothesis of the charge, to be determined by the jury on all the facts and circumstances in evidence before them. And it is no answer to this to say that the conduct of the alleged guilty parties shows that the taking and secretion of the bale of cotton proves the felonious intent. That was evidence, if believed, to be weighed by the jury, and may

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have justified their finding. Still it was, at most, only testimony, upon the sufficiency of which it was their duty to pass. The court, in the charge, could not ignore it, and could not, as matter of law, pronounce it sufficient.

4. In *Griggs v. State*, (in this volume,) we laid down the rule by which to determine when the finder of lost goods commits a larceny in converting them. We need add nothing to what we then said. If the testimony in the present record be true, the bale of cotton had been compressed for shipment, and was found on the track where there was no road-crossing. This, unexplained, would tend to show it must have fallen from the train; and, whether it had marks or not, would tend to show that the finder could easily ascertain who had the special property in it, viz., on this hypothesis, the railroad company. There is nothing in the present record tending to show that the bale of cotton was abandoned goods. Neither of the charges asked should have been given.

Reversed and remanded. Let the defendants remain in custody until discharged by due course of law.

Lacey v. The State.

Indictment containing counts for Burglary and Larceny.

1. *Swearing of jury; failure of record to show.*—Where the record fails to show that the jury were sworn, a judgment of conviction will be reversed.

2. *Confession; when not voluntary.*—Where the prosecutor as a witness testifies that he met defendant after his house had been broken into (a chair, among other things, having been taken therefrom) and said to him "you had better return the chair," and defendant replied that "he would," the witness stating that he offered no inducement or promise or threats to defendant—*held*, that said confession of prisoner was not voluntary, and should have been excluded.

3. *Nol. pros. to one of several counts of indictment; when not error.*—Where an indictment contains two counts the court may allow the solicitor, though demurrer is interposed by defendant, to enter a *nol. pros.* to one of said counts, and not pass upon the demurrer—*re-affirming Wooster v. The State*, 55 Ala. 217.

4. *Punishment for petit larceny; when not error for court to fix the measure of.*—Under section 4361 of the Code of 1876, providing for the punishment of petit larceny, it is not error for the court to fix the measure of punishment by imprisonment in jail, when the jury return a verdict of guilty of petit larceny; the discretion of the jury provided for in said section relates to the matter of super-adding a money fine.

APPEAL from the Circuit Court of Lee.
Tried before the Hon. JAS. E. COBB.

(25)

58	385
96	110
58	385
125	71
58	385
130	104

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The indictment against defendant contained two counts, the first charging burglary and the second larceny. The defendant demurred to the indictment, alleging misjoinder, and other grounds. Pending the argument on the demurrer, the solicitor moved to *nol. pros.* the first count of the indictment, which was granted by the court against the objection of defendant. Defendant then moved to quash the indictment, but was overruled and forced to trial on the second count. E. T. Glenn, the prosecutor, testified that he was the party named in the indictment whose chair was alleged to have been stolen. Solicitor then asked him, if he remembered having any conversation with defendant in relation to the chair, to which witness replied that he had a conversation with defendant on meeting him in Montgomery, when he said to defendant, "you had better return the chair," and defendant replied "that he would." The defendant objected to such evidence, on the ground that a proper predicate had not been laid, and that the language used by Glenn, to defendant, made it objectionable. The witness Glenn, stated in this connection that he offered no inducement of promises or threats to defendant, and all that passed was as above stated, which was before any prosecution had been commenced against defendant.

The jury returned a verdict of "*petit larceny*," and defendant then moved in arrest of judgment, on the ground that the court had no authority to fix the punishment by imprisonment or hard labor, because the sentence under the law had to be ordered by the jury in their verdict. The court overruled the motion, and defendant now appeals to this court upon the record.

Geo. P. HARRISON, JR., for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—1. The judgment of conviction in this case must be reversed, because the record fails to show that the jury were sworn.—Code of 1876, § 4765; *Hicks v. The State*, in manuscript.

2. The confession of the prisoner, given in evidence by Glenn, was not what the law calls voluntary, and therefore should not have been received. The law can not measure the degree of influence exerted upon the prisoner's mind, by an inducement offered, or threat made. The confession, to be receivable in evidence, must be purely voluntary.—*Mose v. The State*, 36 Ala. 211.

3-4. The court did not err in allowing a *nolle prosequi* of
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the first count, (*Lou Wooster v. The State*, 55 Ala. 217,) nor in fixing the measure of punishment. The discretion of the jury, provided for in section 4361 of the Code of 1876, relates to the matter of super-adding a money fine.

Reversed and remanded. Let the prisoner remain in custody until discharged by due course of law.

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Indictment for Bribing, or Attempting to Bribe, another to Commit a Felony.

1. *Evidence; relevancy of, not appearing of record; question properly excluded.*—Where the court refused to allow a witness to state why another witness, who was near him, did not hear a conversation detailed by the former witness, and its relevancy is not shown, and it does not appear that the other witness did not hear such conversation, this court cannot say that the question was not properly excluded for want of relevancy.

2. *Same; question asking opinion of witness.*—The question is also objectionable, because it asks for a mere opinion of the witness as to matters of which the jury are the judges.

3. *Charges; when properly refused.*—Charges assuming facts as proved, of which there is no evidence, are properly refused.

4. *Rulings of court below; when considered correct.*—The rulings of the court below must be considered correct, unless the contrary be affirmatively shown by the record.

APPEAL from the Circuit Court of Elmore.

Tried before the Hon. JAMES Q. SMITH.

Defendant, Nelson Cummins, was indicted at the fall term, 1877, of said court—the indictment charging that he corruptly gave, offered, or promised, to one Caleb Goodgame, the sum of \$25, and a bull yearling, &c., or other thing of value, with intent to influence said Goodgame to kill and murder Fannie Cummins, the wife of the said Nelson Cummins, &c.

During the trial, one Young, a witness for the State, testified, on cross-examination, that he and Sayers (another witness for the State, who had already been examined), were within close proximity to each other; whereupon, defendant's counsel asked said Young, "what was the reason that Sayers did not hear the conversation detailed by the said witness Young." (The bill of exceptions fails to show what was the conversation). The solicitor objected to the question, and was sustained by the court, the defendant excepting.

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56	408
58	387
97	65

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The defendant asked the court to give three charges, which were based upon evidence nowhere appearing in the bill of exceptions. The court refused to give them, and defendant excepted.

The sustaining of the objection of the solicitor to the question above set out; the refusing of the charges asked by defendant, and the judgment of the court below, are now assigned as error.

J. FALKNER, for appellant.—1. The evidence is not all set out in the bill of exceptions, nor as much as is desirable, yet there is enough to show that there was a conflict in several points, and that it was important to the rights of the prisoner that he should have had the fullest latitude in cross-examining the State's witness. The question was proper, particularly on cross-examination.—See *Kelly v. Brooks*, 25 Ala. 523; *Fralick v. Pressly and Wife*, 29 Ala. 457; *Stoudenmire v. Williamson*, 27 Ala. 558; *Thompson v. Dill*, 30 Ala. 444; *Ward v. Reynolds*, 32 Ala. 384.

2. The first charge asked by the defendant should have been given.—See *Harris v. Bell*, 27 Ala. 520; *Taylor v. Kelly*, 31 Ala. 39; *Ward v. Reynolds*, *supra*; *Bell, Adm'r, v. Troy*, 35 Ala. 184. Each of the charges asked by the defendant are clearly matters of law, and ought to have been given by the court. It is, perhaps, objected by the State that the charges asked are abstract; we insist that this position cannot be maintained.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The court did not err in refusing to permit the witness to be asked the reason another witness did not hear a conversation testified to on the trial. The question was irrelevant, because its answer could not tend to prove the issue; it was illegal, because its answer would not have laid a predicate for the contradiction or impeachment of the witness, and because the question called for the opinion of a witness.

2. The first charge asked was properly refused. When analyzed, the answer of the witness was merely that he did not hear the conversation, although he listened. The test of the question, whether or not testimony is negative, may subject the witness to an indictment for perjury. In the case at bar, it would be impossible to convict the witness of perjury, because it would be impossible to prove that he heard. On the contrary, the witness who swore he heard the conversation and repeated it, could be convicted of perjury. This is the case in all affirmative testimony. But testimony is negative where an indictment would not lie, and

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the rule regarding it must be applied, except in those cases where the negative evidence proves an opposite fact; as in the case of an alibi, if such evidence can be considered negative at all, in the sense in which this term is employed.—Starkie on Ev. (Shars. Ed.) pp. 867-8-9 (marg.)

3. The second and third charges were properly refused.

MANNING, J.—The crime charged in this indictment is bribing, or endeavoring to bribe another to commit a felony—the crime of murder. A witness, Young, was examined on behalf of the State, but what his evidence was, does not appear. On cross-examination, he having “stated that he and Sayers, another witness for the State, who had been previously examined, were in close proximity to each other, the witness was asked what was the reason that Sayers did not hear the conversation detailed by said witness Young;” which question was ruled out, and defendant excepted.

1. What this conversation was, between whom it took place, and whether it was relevant, is not shown; nor is it said that Sayers had testified that he did not hear it. We are left wholly uninformed of any matter which would tend to show that the question was not properly excluded for want of relevancy.

2. But there is another objection to the interrogatory: The witness was asked the reason why another person near him did not hear a conversation about which he had testified. It asked, apparently, for a mere conclusion or opinion of the witness. If the object was—as we suppose—to convince the jury that the reason why Sayers did not hear the conversation, was because it did not take place, and the witness, Young, swore falsely, Sayers’ testimony, if there was any such testimony, that he did not hear it, would direct the minds of the jury to inquiry on that subject. The witness, besides, might have been further asked concerning other matters of fact to enforce that inquiry; as, for instance, how far he and Sayers were apart, what was the situation of all the parties relatively toward each other; whether the conversation was in whispers, or in a low or audible voice, and whether Sayers was deaf or not. But he should not have been asked for a conclusion or reason, which it was for the jury, from the facts testified about, to ascertain or infer.

3-4. There was no error in refusing to give the charges asked for on behalf of defendant, for the reason that each one of the three is founded on the assumption that certain facts were proved in the cause, when there is nothing in the bill of exceptions to show that there was any evidence, concerning them, submitted to the jury. As the rulings of the

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court below must be considered correct, unless the contrary be shown, we can not hold upon any thing contained in this record, that they were erroneous.

The judgment must be affirmed.

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108 23/

Miles et al. v. The State.

Indictment for Conspiracy.

1. *Conspiracy; agreement to commit adultery, does not constitute.*—A mere agreement of a man and woman to commit adultery, or fornication, is not a conspiracy to commit a misdemeanor.

2. *A criminal intent must be accompanied by an act, in furtherance of it, before it can become the subject of an indictment.*

APPEAL from Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

The defendants were convicted at the fall term, 1877, of said court, under the following indictment:

"The grand jury of said county charge that, before the finding of this indictment, Bull Miles and Amanda Overton, not sustaining the relation of man and wife, wickedly agreed and conspired together to leave, and did leave the county of Randolph, for the purpose of illicit sexual intercourse between the said Bull Miles and Amanda Overton," against, &c.

A demurrer was interposed to said indictment, by defendant's counsel, but was overruled.

Several charges were asked by defendants, and refused. They now assign as error, among other things, the following:

The indictment charges no offense, and the demurrer, for that reason, should have been sustained.

CICERO D. HUDSON, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—The indictment is framed on the supposition that the consent of a man, and a woman, to commit adultery, or fornication, is a conspiracy to commit a misdemeanor, and therefore indictable. We know of no authority for such a proposition; nor, so far as we can discover, was it ever before asserted, except in *Shannon v. Commonwealth*, 14 Penn. St. 226, and then it received unqualified disappro-

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bation. So long as the parties have proceeded no further than to consent and agree, the offense rests in mere intention, and a criminal intent must be accompanied by an act in furtherance of it, before it is the subject of indictment.

The judgment must be reversed, and a judgment here rendered discharging the appellants from further prosecution.

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Indictment for Living in Adultery or Fornication.

1. *Proof of guilt beyond reasonable doubt; proof that offense is not barred by lapse of time.*—To justify a conviction in a criminal case, the jury must not only be satisfied, beyond a reasonable doubt, that the defendant is guilty, but, also, that the offense charged was not committed before the period which the statute fixes as a bar to its prosecution.

2. *Confessions by one adulterer; when not evidence against the other.*—Confessions made by one of two defendants—charged with adultery, in the absence of the other, are not evidence against the absent defendant.

3. *Appeal in criminal case; when will be dismissed.*—An appeal does not lie in a criminal case until after judgment on the verdict, and if prematurely taken, will be dismissed that the court below may proceed.

4. *Same; case in fieri; when arrest of judgment, and new trial awarded.*—Where a trial is had, and a verdict of guilty rendered, but no judgment pronounced, the case is still in fieri, and under the control of the court; and where erroneous rulings, prejudicial to the defendants, appear from bill of exceptions duly filed, the court below should, at the next term, award a new trial.

APPEAL from Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

The defendants, Charles Gore, and America Hester, were indicted at the fall term, 1876, of said court, for "living together in a state of adultery or fornication."

The only evidence against the defendant, Hester, was the confession of Gore, made under the following circumstances: A witness for the State testified, that in the summer of 1876, he went to said Hester's house, where he had been called by her to see a child of hers, which had been accidentally burned; after looking at the child, he said to defendant, Gore—but out in the yard and not in the hearing of Hester—that "if that child was his, he thought he would send for a doctor," to which Gore replied, "I think I will." Said child was then three years old. The testimony further showed that said Hester gave birth to a child about six months before the trial; but it does not appear that such child was gotten by defendant. Defendants married after the indict-

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ment was found. The evidence being substantially what is above stated, the defendants requested in writing the following, among other charges: "4th. Although the jury may believe that the female defendant has given birth to a child since the commencement of the suit, that without proof satisfying the jury beyond a reasonable doubt that they illicitly co-habited within twelve months before the finding of the indictment, then that would not justify them in finding the defendant guilty;" which charge the court refused, and defendants excepted. The jury found the defendants guilty, but the court rendered no judgment thereon, the record simply reciting that "the defendants, having reserved a bill of exceptions and taken an appeal to the Supreme Court, and having given bail for their appearance at the next term of this court, to abide the judgment that may be rendered in this case, judgment is suspended until the next term of this court."

Defendants' counsel moved for a new trial for defendant Hester, but the court overruled the motion.

Defendants now assign as errors—

1. Refusing the charges asked.
2. In refusing to give defendant Hester a new trial.
4. Insufficiency of the judgment.

HUDSON & TEAGUE, and SAM. HENDERSON, for appellants.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—1-2. The bill of exceptions states that it contains the substance of all the evidence. If this be so, it contains no evidence authorizing a conviction of the female defendant, Hester. The sufficiency of the evidence against Gore was a question for the jury, under proper instructions. Gore's confessions, if he made any, were not evidence against Hester. To justify a verdict of guilty in a criminal prosecution, the jury must be satisfied, from the proof, beyond a reasonable doubt, that the offense charged was committed, and within the time which the statute does not bar. And proof, showing only that one defendant is guilty, even of the offense charged in this indictment, does not justify the conviction of the other. Confessions of one defendant, made apart from the other, are not evidence against that other. The charge refused, numbered 4, should have been given.

3. The present record shows that no judgment has been rendered on the verdict of guilty. No appeal lies from a verdict, until judgment is rendered thereon.—Code of 1876, §§ 4980, 3916. It follows that the appeal in this case must be

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dismissed, that the case may be proceeded in, in the Circuit Court.

4. The question will arise, what should be done with this case, when it is again called up in the court below? No judgment having been rendered in that court, the proceedings are still *in fieri*. Judgment should be arrested, the verdict set aside, and a new trial granted.

Appeal dismissed.

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Indictment for Burglary.

1. *Opinion of witness; general rule; exceptions.*—It is a general rule that a witness must state facts and cannot give his opinion as to their existence; but there are exceptions to the rule, among which is, that as to matters with which the witness is specially acquainted, but cannot be specifically described, a witness may express an opinion, which the jury must take in connection with the facts on which it is based.

2. *Same; when witness may give opinion; weight of testimony, for the jury.* Where the identity of wheat stolen with that found in possession of defendant is a material inquiry, the owner, who is shown to be a miller and grower of wheat for nearly thirty years, and familiar with the different varieties, may testify that when his wheat was cut early the grain had a peculiar smell, and that the wheat in question had been so cut; that the grain found in possession of defendant had the same odor as that in the hogshead from which the grain had been stolen; and may, therefore, give his opinion that the wheat alleged to have been stolen was part of the wheat originally in possession of the prosecutor. The weight of such testimony is for the jury to determine under all the facts and circumstances of the particular case.

3. *Judgment imposing hard labor for costs; what should be specified.*—Judgments imposing hard labor for the county for payment of costs, should specify the precise amount, and the number of days the defendant is to serve for their payment, and the sum allowed for each day's service; but judgments imposing such hard labor at a certain rate until the costs are paid, without specifying the number of days or amount of costs, have been too often sanctioned by this court for them to be now held erroneous.

APPEAL from the Circuit Court of Elmore.

Tried before the Hon. JAMES Q. SMITH.

Defendant, Esley Walker, was indicted at the spring term of said court, and trial was had on the plea of "*not guilty*." The evidence was that the mill-house of one J. C. Westbrook had been broken into sometime in the summer of 1876, by some person who effected the breaking by boring through the floor of said house with an auger, one and one-eighth inch in diameter, which had been kept in a shop near such mill-house; a hole was bored through the bottom of a hogshead which was standing on the floor of said house,

58	898
94	72
58	393
109	25
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113	48
58	898
128	87
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188	128
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136	490

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there being about eighteen or twenty bushels of wheat in the hogshead; that the wheat fell through said hole and through the hole in the floor, some of which was found on the ground under said holes; that on the top of said wheat in the hogshead were grains of corn of different colors, and also grains of black oats mixed in with the wheat; that several bushels of wheat had been taken out of said hogshead; that about two days after said wheat was missed and the holes discovered, the defendant went to said mill with a sack of wheat to have it ground; that the wheat in said sack corresponded with the wheat in the hogshead—had various colored grains of corn, and some grains of black oats, mixed with it.

The State introduced the prosecutor, one J. C. Westbrook, as a witness, who testified that he had been a miller and wheat raiser for thirty years, and was the owner of the wheat in the hogshead, having raised it on his farm and cut it earlier than usual; that early cutting gives it a peculiar odor, and that from a comparison of the wheat in said sack with the wheat in the hogshead, and from his experience, and as an expert, and the peculiar odor of said wheat, he was of opinion that it was a part of the wheat formerly in the hogshead, and had been taken therefrom. To said opinion, as evidence, the defendant objected, and, upon being overruled, took an exception.

The jury found the defendant guilty; and the court imposed a sentence upon him, which the record sets out as follows: "The sentence of the court, on the verdict of the jury, is, that the prisoner do two years hard labor for the county, and an additional hard labor until the costs are paid, at the rate of not less than forty cents per day."

M. L. BULGER, and BRAGG & THORINGTON, for appellant.

1. The ruling of the court below, on the objection to the opinion given by the witness, Westbrook, as an expert, presents the principal question in the case. On questions of science, skill, or trade, and others of *like kind*, the opinion of persons skilled, or *experts*, are sometimes permitted to be given in evidence.—*Washington v. Cole*, 6 Ala. 212. The present instance is not within the rule.

2. The judgment of the court, imposing hard labor, is erroneous, in not specifying that the "additional hard labor for costs," is to be hard labor for the county. The statute should be followed, which is not done.—Code of 1876, § 4731. And to warrant the additional imposition of hard labor the judgment entry should express affirmatively, "*if the costs are not presently paid.*" That portion of the entry is too uncertain and indefinite.

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JOHN W. A. SANFORD, Attorney-General, *contra*.

BRICKELL, C. J.—1-2. It is a general rule that a witness must state facts and cannot state his opinion as to their existence. There are exceptions to the rule, and among others, that as to matters with which he is specially acquainted, but which cannot be specifically described, a witness may express an opinion, which the jury must take in connection with the facts on which it is based.—1 Whart. Ev. § 512. Within this exception, falls the evidence to the admissibility of which objection was made. The identity of the wheat stolen with that taken to the mill by the defendant, was a material inquiry. The wheat stolen was the property of the witness who had raised and cut it. For thirty years the witness had been a miller, and a grower of wheat, and of course had observed whatever distinctive peculiarities there may be in the different varieties of wheat. The wheat had been cut early, and when cut early, the grain has a peculiar odor. Having compared the wheat found in the possession of the defendant with that remaining in the hogshead from which his wheat had been stolen, and discovering that it had the same odor, we do not perceive the force of the objection to his expression of the opinion that the wheat in the possession of the defendant, was a part of the wheat originally in the hogshead. The identity of the two parcels of wheat was of matter about which he had special knowledge and which was not capable of proof by any other means. The weight of the evidence was for the consideration of the jury, and perhaps would be regarded as of little value, if the fact was, that all the facts on which the opinion was based, would have been equally applicable to any other parcels of wheat as to those in the hogshead, and in the sack, if cut early. Its weight, and its admissibility are different questions.

3. The practice of entering judgments imposing hard labor for the county, for the payment of costs, in the form in which the present judgment is entered, has prevailed too long, and has been too often sanctioned by this court, for any disturbance of it. If the question were open, I would not hesitate to declare it irregular. No such judgment ought to be entered without specifying the precise amount of the costs, and the number of days the defendant is to serve for payment of them, and the sum allowed for each day's service. This certainly is due to the dignity of a judgment, depriving a citizen of his liberty, and condemning him to compulsory labor.

The judgment must be affirmed.

Carroll v. The State.

Trespass after warning, tried before a Notary Public and ex-officio Justice of the Peace, in pursuance of an act conferring jurisdiction of all misdemeanors upon justices of the peace in certain Counties.

1. *Notaries public; origin and duties of the office; constitutional and statutory provisions.*—Notaries are of ancient origin, long known to the civil and common law. Statutes have been enacted regulating the manner of their appointment, and to some extent defining their duties, which were formerly strictly ministerial—not clothed with judicial power, nor charged with judicial duty. The Constitution merely recognizes the existence of the office and provides for the mode of filling it; it does not create the office.

2. *Same; power of appointment by governor; civil and criminal jurisdiction conferred.*—Under the Constitution, the governor has the power to appoint notaries public, conferring upon them only such powers as are appropriate to their office under existing law, or, in addition, the powers and jurisdiction of justices of the peace. In the latter case, the notary may exercise all the civil and criminal jurisdiction of a justice of the peace, as defined by statutes then existing, or thereafter enacted.

3. *Constitution; rule for construing.*—Many rules for the construction of statutes are of but limited application to the construction of the Constitution. The safest rule for construing the latter is to regard, not so much the form or manner of the expression, as the nature and object of its provisions, and the end to be accomplished, giving the words their just and legitimate meaning.

4. *Same; meaning of term "proviso."*—Because the term *provided* is used in a law it does not necessarily follow that the matter which may succeed it is a *proviso* in its technical sense; it is the matter of the succeeding words, and not the form, which determines whether it is or not a technical *proviso*.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JAMES E. COBB.

The appellant, C. A. Carroll, was tried, convicted and fined by one Thomas L. Kennedy, notary public, on a charge of trespass after warning. From the judgment of conviction an appeal was taken to the said Circuit Court, and a statement there filed by the solicitor, upon which the trial was had *de novo*. Said statement is as follows:

State of Alabama, }
Lee County, } Circuit Court, Spring Term, 1877.

On appeal from the justices' court of Thomas L. Kennedy, notary public and justice of the peace, in and for said State and county, and beat number 2, the State of Alabama, by its solicitor, complains of C. A. Carroll, that within twelve months before the commencement of this prosecution, he did, without legal cause or good excuse, enter into the dwelling house, or, on the premises, of one Joseph Bar-

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nett, after having been warned within six months preceding, not to do so, against the peace and dignity of the State of Alabama.

J. R. DOWDELL, Solicitor 9th Circuit.

To this statement the defendant demurred, alleging as grounds :

1st. That said statement shows that T. L. Kennedy, Esq., who acted as notary public, had no jurisdiction in the premises.

2d. Said statement discloses that the judgment of conviction, from which the appeal was taken by defendant, was rendered by a notary public.

3d. That the act of the Legislature, approved Feb. 8th, 1877, entitled "An act to increase the criminal jurisdiction of justices of the peace and notaries public having like powers, in the counties of Lee, Madison, Jackson, Clarke, Choctaw, Walker, and Marion," is unconstitutional and void, in so far as it relates to notaries public.

The same question as raised by demurrer was presented by motion to quash, and by motion in arrest of judgment. The motions and demurrer were overruled, and defendant excepted. Such ruling is now assigned as error.

J. M. CHILTON, for appellant.—1. Whether the notary had jurisdiction depends upon the validity of an act of the legislature, approved Feb. 8th, 1877.—Acts 1876-7, p. 197. For prior to this act, even if we concede that notaries had power of justices, they did not have jurisdiction of the offense here charged.—R. C. § 3932.

2. Without questioning the power of the legislature to confer upon *justices of the peace* the jurisdiction created by the act, we insist that the power does not exist to confer such jurisdiction upon notaries public. Section 26 of Article VI. of the Constitution of 1868, and section 13 of the same article of the present Constitution, are essentially alike, and refer to *civil*, not criminal jurisdiction. This has already been so held, as to that part of the sections referring to justices.—*Taylor v. Woods*, 52 Ala. 474.

3. The portion of the sections referring to notaries, as clearly relates to *civil* jurisdiction as what precedes. The two parts are connected by a *proviso*, the "natural and appropriate office" of which, is to limit what follows by what precedes.—*Ravels v. Kennedy*, 23 Ala. 240; *Pearce v. Bank Mobile*, 33 *ib.* 693.

4. Again, said section of the present Constitution provides that the jurisdiction authorized to be conferred upon notaries, shall be exercised within the precinct or ward for

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which they are appointed—a feature entirely consistent with civil, but wholly inconsistent with criminal jurisdiction. For justices, while limited to their precinct, in civil matters, have criminal jurisdiction throughout the county.

5. We refer to these sections, not as containing any limitation on the power of the legislature in the matter of conferring criminal jurisdiction, but simply as showing that they refer solely to civil jurisdiction, and contain no *grant* of criminal jurisdiction.

6. The prohibition upon which we rely, is founded in section 8 of the "Declaration of Rights," Constitution of 1875. That section first asserts the general proposition, that for an "indictable" offense, no one shall be proceeded against by "information." Afterwards are mentioned the only exceptions to the general prohibition: "*Provided, that in cases of petit larceny, &c., and other misdemeanors, the general assembly may, by law, dispense with a grand jury, and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be by law established.*"

7. By this section, the framers of the Constitution divide criminal procedure into the two most general heads, namely, proceedings by indictment, and proceedings in the absence of an indictment or by information. It asserts, in effect, as a general proposition, that every person charged with an indictable offense, shall be entitled to have it passed on by a grand jury. Then follow the two, solitary exceptions. Notaries public do not fall within the exception, unless they are "justices of the peace," or fall within the designation of "such other inferior courts as may be by law established."

8. A notary is, in no sense, a justice of the peace. The Constitution recognizes the two, as distinct classes of magistracy. It speaks of justices of the peace, and of notaries public. Because it refers to the civil jurisdiction of justices, in defining the civil jurisdiction of notaries, it does not constitute a notary a justice. If it did, a justice might, with equal propriety, be called a notary. Nor is a notary *ex-officio* a justice of the peace, though popularly so called. Acts of the legislature establishing city courts, generally provide that the clerk shall exercise all the powers of clerks of the Circuit Court; but this does not constitute the clerk of the City Court, *ex-officio* clerk of the Circuit Court. The very act under discussion, purports to confer upon justices, &c., concurrent jurisdiction with the Circuit Court, &c.; but this does not make the justice *ex-officio* judge of the Circuit Court. Had the framers of the Constitution intended that notaries should be *ex-officio* justices, they would have so de-

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clared. In the charters of cities, it has been frequently declared that the mayor should be *ex-officio* a justice of the peace—thus showing legislative recognition of the distinction.—Acts 1872-3, p. 364, § 22.

9. Nor does a notary fall within the designation of such other inferior court as the legislature may by law establish. Because, the legislature, under the power granted to establish inferior courts, can establish no court established by the Constitution. It can only create such courts as are not constitutional courts. Courts of notaries and justices are created by the *Constitution*, and do not, therefore, remain to be created by law. The term "inferior courts," as used in the 8th section of the Declaration of Rights, is used in the same sense as in other portions of the Constitution.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The Constitution of the State recognizes two classes of notaries public. To one class, in addition to the powers given by the law merchant and recognized everywhere in the mercantile world, it gives the judicial authority pertaining to a justice of the peace. To the other class nothing is granted beyond the power conferred by the law merchant.—Constitution of Alabama, Art. VI. § 26.

2. The first class of notaries public is equal in every respect with justices of the peace. The title to the office is derived from different powers; but in everything else they are identical.

3. There is nothing in the Constitution of the State that forbids the general assembly to make the jurisdiction of the justices of the peace over misdemeanors, co-terminous with the county. This power it has exercised. In Lee county, the jurisdiction of justices of the peace over misdemeanors is concurrent with that of the Circuit Court.—Bill of Rights, § 9; Acts 1876-7, p. 197. The act which confers this power violates no provision of the Constitution, and is, therefore valid.

4. But the notaries public having the jurisdiction of justices of the peace within precincts, have the same power conferred on them in Lee county as has been granted to the justices. Therefore, as the case at bar was within the jurisdiction of a justice of the peace it was within that also of the notary public, and the court committed no error in its action.

BRICKELL, C. J.—On the 8th of February, 1877, an act of the general assembly was approved, which confers on justices of the peace and notaries public, having like pow-

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ers, in several counties, and of them the county of Lee, original jurisdiction concurrent with the Circuit Court, of all misdemeanors committed in said counties.—Pamph. Acts 1876-7, p. 197. The single question this case presents, is the validity of this enactment, so far as it confers jurisdiction on notaries public.

The ninth section of the first article of the Constitution authorizes the general assembly to dispense with a grand jury in prosecutions for misdemeanor, and to confer on justices of the peace, or such other inferior courts as may be by law established, jurisdiction of such prosecutions. The twenty-sixth section of the sixth article prescribes the number of justices of the peace—the mode of their election, and the extent of their civil jurisdiction, and concludes: “*Provided*, That the governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, shall have and exercise the same jurisdiction as justices of the peace within the precincts and wards for which they are respectively appointed. *And provided*, That notaries public, without such jurisdiction, may be appointed. The term of office of such justices and notaries public shall be prescribed by law.”

Notaries are of ancient origin, long known to the civil and common law. Originally, a mere scribe, taking notes or minutes, and making drafts of writings and public instruments, his duties were extended with the growth of commerce, and became more frequent in attestation and authentication of instruments peculiar to maritime law, or the law merchant. Hence, because of the credence which all civilized nations attach to his attestation and authentication of such acts, to facilitate commercial intercourse, it is said he is an officer known to the law of nations.—*Kirksey v. Bates*, 7 Port. 529. Statutes have been enacted regulating the manner of his appointment, and to some extent defining his duties. These duties were strictly ministerial—with judicial power he was not clothed, nor was he charged with any judicial duty. The Constitution does not create the office. It recognizes its existence, and provides for the mode of filling it. The character of its duties, as defined by the common law, or the law merchant and maritime law, which had become incorporated into our common law, and by statutes, relating peculiarly to the authentication of instruments, intended as matter of evidence at home and abroad, rendered it peculiarly proper that the head of the executive department should be clothed with the power of appointment to the office. The Constitution authorizes the governor, when

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appointing, to limit his power and duty, as it was confined by the common law and existing statutes, to ministerial power and duty, or to authorize him to exercise the jurisdiction of a justice of the peace. It is argued, that as the power of the governor to appoint, and clothe with the jurisdiction of a justice of the peace, is found in the form of a proviso, to the section of the Constitution which defines the civil, and is silent as to the criminal jurisdiction of justices, that the jurisdiction the governor may authorize the notary to exercise is the civil jurisdiction defined in the preceding part of the section. It is a general principle, that the natural and appropriate office of a *proviso* to a statute, is to restrain or qualify some preceding matter, and upon sound principles of construction it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter.—*Rawls v. Kennedy*, 23 Ala. 240; *Pearce v. Bank of Mobile*, 33 Ala. 693; *Potter's Dwaris*, 118. A *proviso*, says BALDWIN, J., "in deeds and laws is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided."—*Voorhees v. Bank of U. S.* 10 Pet. 471. In *Wayman v. Southard*, 10 Wheat. 30, it is said: "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure, to modify the enacting clauses." Another purpose for which it is often employed, is to exclude some possible misinterpretation of the general words of the enacting clause, as extending to cases not intended to be brought within its purview.—*Minis v. U. S.* 15 Pet. 423. It does not necessarily follow because the term *provided* is used, that which may succeed it is a *proviso*, though that is the form in which an exception is generally made to, or a restraint or qualification imposed on the enacting clause. It is the matter of the succeeding words, and not the form, which determines whether it is or not a technical *proviso*. This and similar rules of statutory construction, are of limited application in the construction of the Constitution. "Rightly understood and rightly applied, they undoubtedly furnish safe guides to assist us in the task of exposition. But they are susceptible of being applied, and indeed, are often injuriously applied to the subversion of the text and the objects of the instrument."—1 Story Const. § 448. The safe rule of constitutional construction, is to regard, not so much the form or manner of expression, as the nature and objects of its provisions, and the end to be accomplished, giving its words their just and legitimate meaning. The provision of the Constitution under

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consideration is obviously intended to confer on the governor the power of appointing notaries public; and in appointing, either to clothe them only with the powers appropriate to their office, as they were defined by existing laws, or in addition, with the same jurisdiction as justices of the peace. That jurisdiction was defined, not only by the preceding part of the section, to which this provision is attached, but by section nine of the first article, and by laws which had been passed pursuant to it, under a similar provision in the Constitution of 1865 and 1868. No particular significance can be attached to the form, except that the general power of the qualified electors of each election precinct to elect two justices of the peace, is not to exclude the power of the governor to appoint notaries, having like jurisdiction. Nor should the power of the governor to appoint such notaries, as is expressed in another provision, having the mere form of a *proviso*, exclude his power to appoint notaries without such jurisdiction. If the governor has, or may, in the county of Lee, and the other counties named in the act of the 8th February, 1877, as it is admitted in this case he had, appointed notaries with "the same jurisdiction of justices of the peace," we cannot doubt the notary is clothed alike with the civil and the criminal jurisdiction of a justice, whether that jurisdiction is defined by section twenty-six of article six, or by section nine of article one, or by statutes which may have been, or may be enacted in reference to justices. This was the ruling of the Circuit Court, and its judgment is affirmed.

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Motion in the Supreme Court to establish Bill of Exceptions.

1. *Charges of the court; exception at bar; amendment.*—The court charged the jury, that "When an assault is made and resistance or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and danger of the assault, the offense amounts to murder. A good definition of cruelty is, the infliction of great pain or misery without necessity. Death causes misery to the family of those bereaved,"—and the defendant then excepted at bar to "that part of the charge about cruelty and the part connected therewith;" but in writing out the bill, they presented the exception as follows: "An exception was also reserved to each and every part of the following portion of the judge's charge, to-wit, (and here the part above quoted was set out);" and the judge afterwards struck out, of the paragraph quoted, all except the last two sentences, which contained the definition of

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cruelty, so as to make it appear that the exception was to that part only, whereupon motion is made to correct the bill of exceptions,—*Held*,

1. That the exception at bar raised also the question of error in the construction respecting the effect—as evidence of homicidal malice—of cruelty on the part of a person assailed in the manner of his slaying the assailant.

2. That the exception now contained in the bill, should be stricken out and the following inserted: “And defendant excepted to the definition of cruelty in the following charge, and also to so much thereof as explains the effect—as evidence of malice—of the use, by one assailed, of a deadly weapon in a cruel manner, against his assailant.”

Heard before the Supreme Court, on affidavits filed in pursuance of the following notice :

“To Hon. Alpheus Baker, Judge of the City Court of Eufaula; to Alto V. Lee, Solicitor of the 8th Judicial Circuit of Alabama, and to S. H. Dent, Esq., leading counsel for the State in said case :

“IN SUPREME COURT OF ALABAMA, JULY, A. D. 1877.

Alexander Judge alias Alex. Judge v. The State of Alabama.

“Take notice that on next Thursday, the 12th day of July A. D. 1877, the appellant in the above named case, will make a motion in the Supreme Court of Alabama to establish a correct bill of exceptions in the same, in accordance with the facts and particulars contained in affidavits made and to be filed in the Supreme Court, which affidavits are hereto attached for your inspection, that you may the better understand what action you will take in the premises.

SAM'L W. GOODE and

A. H. MERRILL,

Att'ys for Appellant.

[The affidavits did not all come into Reporters's hands, so none of them are here published ; but the substance of them may be clearly understood from the opinion.]

MANNING, J.—This cause was submitted on a motion, under the statute to amend the bill of exceptions, by evidence presented to this court. We have examined the affidavits of the learned and estimable judge of the City Court and of the counsel on both sides of the cause, and find that, in reference to the point over which the contestation is made, there is really no difference between them. In the course of his charge, covering the entire case, the judge said to the jury: “When an assault is made and resistance or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and the danger of the assault, the offense amounts to murder. A good definition of cruelty is, the infliction of great pain or

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misery without necessity. Death causes misery to the family of those bereaved." Defendant's counsel put in an exception at the bar to "that part of the charge about cruelty and the part connected therewith." In writing out the bill of exceptions they presented this exception as follows: "An exception was also reserved by the defendant to each and every part of the following portion of the judge's charge, to-wit:," and here the part of it above quoted was set out. On reading this statement of the exception, the judge thought and said, that it was broader than the exception really taken; and that he understood it then as relating only to his definition of cruelty. And the counsel for the State being absent, he objected to signing the bill until their return. But being urgently pressed for his signature to it then, he finally yielded, and signed it. Thereupon the judge and the counsel for the appellant went from the place where this was done immediately to the court-house, and on arriving there, the counsel for the appellant had the bill of exceptions marked filed, by the clerk, and then began to argue a motion they had made for a new trial. Among other reasons in support of it, they urged that it should be granted, because the charge to the jury above set forth, authorized them to find defendant guilty of murder when the striking back was with a deadly weapon cruelly used—although death had not been thereby produced to the party so stricken. An exception not having been made on that account, by which the attention of the judge might be called to this supposed defect, and a correction be made of the charge in that particular—while the jury were present—and he not being aware of that omission therein, he called for the bill of exceptions,—and on examination struck out of the paragraph quoted, all except the last two sentences, which contained the definition of cruelty—so as to make it appear that the exception was to that part only. And the motion now is to have that portion of the instruction which was stricken out, restored to and form a part of the bill of exceptions.

The point of the contention on the part of the judge is, that defendant did not except to the charge, on account of the omission from it, of the condition that death ensue from such cruel use of a deadly weapon, and did not in any manner call his attention to such omission. Herein the judge is evidently not mistaken. Counsel for defendant admit that they had not themselves then perceived that supposed defect. They were not aware of it, until they came to copy the notes of the entire charge, which the judge handed to them to be used in preparing the bill of exceptions. But it does not seem to us that such a circumstance is a matter of any im-

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portance whatever. There was no dispute about the death of the man on whom the weapon spoken of as deadly had been used, in this case, or that his death was caused by it as wielded by the defendant. That was proved by numerous witnesses, was the foundation-fact of the prosecution, and the subject of the entire charge, whereby it was impressed very distinctly upon the minds of the jury. And as the paragraph quoted was a part only of the entire charge, and was designed merely to explain what the law considered to be evidence of malice in the conduct of a party who, when assailed, unnecessarily used a deadly weapon in a very cruel manner in return, the omission referred to was, in our opinion, so unimportant as not to give any value to the exception.

But while the exception was in that particular immaterial, it seems to us that it reached further than the mere definition of cruelty in the charge. It raised, also, the question of error or not in the instruction given, respecting the effect, as evidence of homicidal malice,—of cruelty on the part of a person assailed, in the manner of his slaying of the assailant. We are of opinion, therefore, that the part of the charge which the judge of the City Court admits he gave, but struck out of the bill of exceptions because not excepted to, so as to call attention to the omission mentioned, should be restored; and that the exception thereto now contained in the bill, should be stricken out, and the following be, instead thereof, inserted, to-wit: And defendant excepted to the definition of cruelty in the following charge, and also to so much thereof as explains the effect—as evidence of malice—of the use, by one assailed, of a deadly weapon, in a cruel manner, against his assailant.

It is ordered that the bill of exceptions be amended accordingly.

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Indictment for Murder.

1. *Section of the Code defining murder; erroneous charge.*—The section of the Code (B. C. § 3653; Code of 1876, § 4295,) defining or enumerating instances of murder in Alabama, covers the whole field of murder, and clearly asserts that the crime, when attended with any of the enumerated circumstances, falls within the *first degree*, and every murder not attended with some of these enumerated circumstances, falls within the *second degree*. Hence a charge stating that, "These are only instances of murder in the first degree, and the crime is not limited to a killing under these enumerated circumstances," is erroneous.

2. *Erroneous charge, ignoring essential elements of murder.*—A charge asserting that, "When an assault is made, and resistance or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon used in a very cruel manner, not justified by the nature and danger of the assault, the offense amounts to murder," is erroneous, because it ignores the nature of the assault resisted, the reasonable probability of escape by retreat, the heat of blood likely to be engendered by an assault, the question of cooling time, and the inquiry of a "formed design," without which there can be no murder under the facts postulated in such charge.

3. *Homicide in resenting an assault; when manslaughter; when murder.*—A homicide committed in undue resentment of an unlawful assault or battery, if done in the heat of blood caused thereby, before cooling time, and without previously formed design, is but manslaughter; yet if one who is assaulted, under cover of such assault as a pretext, pursuant to a "formed design," and not in reasonable defense of himself from grievous bodily harm, nor while dethroned of his reason by passion engendered by such assault, slay his opponent with a deadly weapon, it is murder.

4. *Same; murder; self-defense; manslaughter.*—Death by excessive resistance of an assault, even when cruel, is not always murder. If inflicted pursuant to a formed design, if there be other satisfactory evidence of premeditation, then it is murder. On the other hand, if the resistance be not greatly disproportioned to the assault, and death ensue by misadventure, this is *self-defense*. If the resistance be excessive, and the fatal blow be inflicted in the heat of blood, although with a deadly weapon, and there be no evidence of previous malice, formed design, or of such deliberation as to show that reason held away, it is *manslaughter*.

5. *Cases cited by Mr. Bishop, held not to sustain his theory.*—The court refers to the adjudged cases cited by Mr. Bishop, (*Oraton's case*, 6 Ire. 164; *Curry's case*, 1 Jones' Law, 280; *Scott's case*, 4 Ire. 409; *Hayward's case*, 6 Carr. & P. 157; *Shaw's case*, Ib. 372; *Thomas's case*, 7 Ib. 817; *King's case*, 2 Va. Cas. 78; *Lynch's case*, 5 Carr. & P. 324,) in support of the principle which constitutes the charge in consideration, and does not think they sustain the principle announced by Mr. Bishop, in support of which they are cited—such principle postulating too little as a guide for a jury—the court holding, that while murder may be committed under the circumstances laid down by Mr. Bishop, and contained in the said charge, yet such killing is not necessarily murder.

6. *Homicide reduced to manslaughter; murder; questions for jury; words will not extenuate homicide.*—It is the frailty of human passion, suddenly excited by sufficient provocation to an unpremeditated act of violence, which tones homicide down to manslaughter; while calculation, deliberation, formed design, contrivance, brutality, are characteristics of murder; and these are always ques-

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tions for the jury, under appropriate instructions. Mere words, no matter how insulting, never reduce a homicide to manslaughter.

7. *Same; principle laid down in Field's case.*--An affray may occur or sudden provocation be given, which, if acted on in the heat of passion produced thereby, might mitigate homicide to manslaughter; yet if the provocation, though sudden, be not of that character which would, in the mind of a just and reasonable man, stir resentment to violence, endangering life, or if "cooling time" had intervened, the killing would be murder. Such homicide may also be attended with evidence of express malice—as preparation for the killing, the weapon employed, &c. (Approving *Field's case*, 52 Ala. 348.)

8. *Matters to be observed in charging the jury.*--In charging a jury, respect should be had to the evidence; and instruction should be given on every hypothesis of fact, which the testimony may tend to support. The court remarks, that "we are pleased to observe, that in this case the old, sound, and much disregarded doctrine, that 'no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat,' has been given in charge, and must have been acted on by the jury."

APPEAL from City Court of Eufaula.

Tried before the Hon. ALPHEUS BAKER.

Defendant, Alexander Judge, was indicted for killing unlawfully and with malice aforethought, one Robert D. Wallace, by striking him with a stick or wagon standard. Issue was joined upon the plea of "not guilty," and defendant was convicted of murder in the first degree and sentenced to be hanged on Friday, the 27th day of July, 1877.

The testimony was, that the deceased was foreman of a plough squad on the plantation of one Wm. H. Locke, and it was the duty of deceased to report any idleness or misconduct of the plough hands, and that defendant was one of such squad, and a larger man than deceased; that deceased had been instructed by Mr. Locke to hurry up idle hands, and if they refused to report them. About 11 o'clock on the morning of the killing, the hands had come out of the field on account of rain, and when the rain had ceased, the defendant and other hands were going to the lot for their mules. Defendant being a little slow, deceased remarked to him, "Alex, go and get your mule," to which defendant replied, "Ain't I gwine"; deceased replied, "if you are you are going blamed slow," when defendant said, "if you want me to go faster, make me." Deceased then remarked, "Alex, next time I speak to you and you answer me that way, I'll knock your blamed mouth wide open." Defendant then looked back at deceased, but said nothing. Deceased then said, "Alex, if you want a difficulty you can get it right now," to which defendant replied, "if you want one you can get it." Deceased then turned towards defendant and, having gone a few paces in ordinary gait, put his right hand in his pocket, when defendant went to the right, five or six steps from deceased, and snatching up a wagon standard returned, and meeting the deceased struck him two licks on the left arm,

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which the deceased had thrown up to keep off the blows—the right hand of deceased hanging by his side. The defendant hit deceased a third time, on the right shoulder, and a fourth time, on the head, when deceased fell towards the defendant, who struck him a light blow on the back while he was down. Deceased jumped up immediately. By this time two persons present caught hold of defendant, standing between him and deceased. Deceased was standing still, when defendant jerked loose from those holding him, with the standard still in his hand, and stepped towards deceased and struck him on the head, just above the ear, knocking him down—defendant having both hands on the standard and striking with all his force. Deceased got up “looking foolish,” and picked up a knife which was lying on the ground shut up, and opened it and started towards the defendant, when some one present remarked, “shut up your knife, you can’t get to that man (the defendant) while he has got that stick in his hand, he will kill you.” Deceased then shut the knife, put it in his pocket, and went into a house near by and ordered the hands to go to ploughing. He then came out of the house, got on his horse and rode towards Mr. Locke’s house, about a mile off, where he died in a few hours from compression of the brain, (as testified by physicians,) produced by a fracture of the skull from the blow given by defendant.

After the close of the evidence, the court charged the jury at length; but the only portions of the charge necessary to be considered, from the view taken of the case by this court, are stated in the opinion.

From the judgment of the court below, the defendant now appeals to this court.

SAMUEL W. GOODE and A. H. MERRILL, for appellant.—1. The crime of murder in the first degree, is limited to the enumerated circumstances mentioned in § 3653 of the Code. Unless the circumstances are just what that section makes necessary, there can be no murder in the first degree in Alabama, that section being the only standard by which the crime is to be determined, and containing the only definition for the crime in this State.

2. That part of the charge beginning, “When an assault is made and a resistance or striking back is justified, yet,” &c., is erroneous, because it directs attention to a certain selected portion of the evidence to the exclusion of others.

JOHN W. A. SANFORD, Attorney-General, and S. H. DENT, *contra*.

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STONE, J.—Speaking of section 4295 of the Code of 1876, (Rev. Code, § 3653,) the City Court charged the jury, that “These are only instances of murder in the first degree, and the crime is not limited to a killing under these enumerated circumstances.” In this the City Court erred. The section of the Code, with marked emphasis, enumerates the circumstances under which a homicide perpetrated becomes murder in the first degree, and then adds: “Every other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree.” The statute, in its two branches, covers the whole field of murder, and asserts that the crime, when attended with any of the enumerated circumstances, falls within the first degree; and every murder, not attended with some of those enumerated circumstances, falls within the second degree. The boundary between the two degrees is clearly defined; and when the murder does not come up to the requirements of some one or more of the classes enumerated and defined as constituting murder in the first degree, it necessarily belongs to the second, which is in form and substance a residuary clause, and covers the whole ground not previously disposed of.

2. In another branch of the charge, we think the City Court erred. The language of the court was, “When an assault is made, and resistance, or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and the danger of the assault, the offense amounts to murder.” This instruction or definition ignores the nature of the assault thus resisted, whether dangerous or not—the reasonable probability of escape by retreat—the heat of blood likely to be engendered by an assault—the question of cooling time, and the inquiry, never to be overlooked, of a formed design, without which there can be no murder, under the facts postulated in this charge.

3. A homicide committed in undue resistance or resentment of an unlawful assault, or assault and battery, if done in the heat of blood caused thereby, before cooling time has supervened, and without any previously formed design, is but manslaughter. We do not say that murder may not be committed in excessive resistance to an assault and battery. It frequently is so committed. If one who is assaulted, under its cover as a pretext, pursuant to a formed design, either general or special, and not in reasonable defense of himself from grievous bodily harm, and not in that sudden dethronement of the reflecting faculty which such assault may engen-

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der, slay his assailant with a deadly weapon, this is murder. See *McManus v. The State*, 36 Ala. 285; 2 Bish. Cr. Law, § 736.

4. Death by excessive resistance of an assault, even when cruel, is not always murder. If inflicted pursuant to a formed design—or, if there be other satisfactory evidences of premeditation, then it is murder. On the other hand, if the resistance be not greatly disproportioned to the assault, and death ensue by misadventure, this is self-defense. If the resistance be excessive, and the fatal blow be inflicted in the heat of blood, although with a deadly weapon, yet if there be no evidence of previous malice, formed design, or such evidence of deliberation as to show that reason held sway, this is manslaughter.—*Tempe v. State*, 40 Ala. 350.

5. We are aware that the charge we have been criticising, is copied literally from a part of section 725 (632) of 2d volume Bishop's Criminal Law. This is but a part of the section. The context reads as follows: "If the weapon is deadly, then, supposing the passion not excited, the offense is murder, though committed without any intent to kill. But in those circumstances in which the reason is clouded, if the party assailed uses a deadly weapon, and kills his adversary with it, his offense is only manslaughter." Then comes the section we have been considering, to-wit: "Yet, even here, when resistance is made by a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and danger of the assault, the offense amounts to murder."

In support of this last principle, several cases are cited by Mr. Bishop. We have examined them all. The strongest case is that of *State v. Craton*, 6 Ire. Cases, 164; an opinion by Chief Justice RUFFIN. In that case, Craton, the prisoner, was in the commission of a great wrong against the marital rights of the deceased, in which he persevered and persisted, notwithstanding the remonstrance of the deceased. And when the prisoner struck the fatal blow, he was in no danger of an attack; and was evidently influenced by a desire to drive the deceased away, that he might carry out his unauthorized possession of deceased's wife, and not by any fear of danger to himself. Notwithstanding Craton had given Harrison, the deceased, such great provocation, and notwithstanding the insulting surroundings in which the latter was then placed, that great jurist, RUFFIN, employed the following language: "The court agrees that if Harrison either assaulted or imprisoned Craton unlawfully, it would amount to a legal provocation. The question is, whether that was the case. There was no actual assault in this case. There was

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no attempt to strike. There was a mere threat, that the deceased would kill the prisoner, if he did not give up the other's wife, and, accompanying the threat, the deceased drew his knife. But he made no attempt to use it, unless it be that he raised his hand with the knife drawn as the prisoner approached him. But if he did so, that would not be an unlawful assault; for, as the prisoner got from his horse, stripped himself, and declared that he would beat the deceased, if he did not leave him in possession of his wife, and then went at the defendant for the purpose of beating him, with an instrument, apparently, from its size, sufficient to give a heavy blow, and with the instrument raised, and the deceased still sat on his horse, and did not move from his place, an attempt, if made by deceased, to strike under those circumstances, and supposing the deceased was not wrong in stopping the prisoner from carrying away his wife, would have been justifiable in self-defense. The prisoner was in the act of making the first assault, and that, probably, of a grievous kind, and the deceased would have had a right to prevent him if he could." We may add, this was clearly a case of murder.

A later case, in the same court—*State v. Curry*, 1 Jones' Law, 280—like the one above, contains a fine collection of authorities, and is worthy of being consulted. The court said, "If two men fight upon a sudden quarrel, and one be killed, it is but manslaughter, although the death is caused by the use of a deadly weapon. But if, in such case, the killing be committed in an *unusual manner*, showing evidently that it is the effect of deliberate wickedness—malice, not passion—it is murder, although there be a high provocation." We consider this a very correct statement of the rule, in both its aspects.—See, also, *State v. Scott*, 4 Ire. 409.

In the case of *Rex v. Hayward*, 6 Car. & Payne, 157, the court very accurately said, "In a case of death by stabbing, if the jury are of opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might be considered as not being at the moment the master of his own understanding, the offense will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat, before the mortal wound was given, the offense will amount to murder; and if the prisoner displayed thought, contrivance and design, in the mode of possessing himself of the weapon, and again replacing it after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason, than of violent and ungovernable passion."

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The case of *Rex v. Shaw*, 6 Car. & P. 372, showed deliberate purpose and formed design, and was rightly adjudged to be murder, although the homicide was perpetrated in a rencontre.—See, also, *Rex v. Lynch*, 5 Car. & P. 324; *King v. Corn*, 2 Va. Cases, 78—a strong case, showing formed design.

In *Rex v. Thomas*, 7 Car. & P. 817, Baron PARKS ruled that “The law requires two things—1st, that there should be the provocation; and, 2d, that the fatal blow should be clearly traced to the passion arising from that provocation. Therefore, if from the circumstances it appear that the party, before any provocation given, intended to use any deadly weapon towards any one who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, and the crime would, therefore, be murder.”

In the body of the opinion, the court said: “If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but, under the influence of that wicked disposition, that bad spirit which the law terms ‘malice,’ in the definition of wilful murder, then the offense would not be manslaughter. * * And so, if you find that before the stroke is given, there is a determination to punish any man who gives a blow, with such an instrument as the prisoner used, [it was a sword cane]; because, if you are satisfied that before the blow was given, the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving of such a wound to the passion of anger excited by that blow; for no man who was under proper feelings—none but a bad man, of a wicked and cruel disposition—would really determine before hand to resent a blow with such an instrument.” Referring to a threat made by the prisoner, the court instructed the jury, that “if he [the prisoner] really intended what he said, and meant to strike any one with that instrument who might give him a blow, it is for you [the jury] to say whether that intention does not amount to that badness of disposition to which I have referred.”

We have now referred to the adjudged cases cited by Mr. Bishop in support of the principle which constitutes the charge we are considering, and we do not think any or all of them sustain the principle announced by Mr. Bishop, in support of which they are cited. As a guide for a jury, it postulates too little, as shown above.

6. We repeat, we do not say, or intend to be understood as affirming, that “where resistance is made by a deadly weapon,

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and the weapon is used in a very cruel manner, not justified at all by the nature and danger of the assault," this can not be murder. Very far from it. Murder may be committed under these circumstances; but such killing is not necessarily murder. It depends on the nature and instrument of the assault which is resisted, and the attendant circumstances, as indicating contrivance and design, or fierce passion, suddenly aroused. It is the frailty of human passion, suddenly excited by sufficient provocation to an unpremeditated act of violence, which tones the offense down to manslaughter; while calculation, deliberation, formed design, contrivance, brutality, are characteristics of the higher crime of murder. And these are always questions for the jury, under appropriate instructions. But mere words, no matter how insulting, never reduce a homicide to manslaughter.

7. In *Fields v. The State*, 52 Ala. 348, this court said, "An affray may have occurred, or a provocation been given, which, if acted on in the heat of passion it would suddenly produce, the law, in tenderness to human frailty, would receive as mitigating an unlawful killing to manslaughter. If, however, the provocation, though sudden, was not of that character which would, in the mind of a just and reasonable man, stir resentment to violence, endangering life; or if, between the time it was given and the killing, 'cooling time,' as it is quaintly and forcibly expressed in the older books—time in which passion would have subsided, unless wrath had been nursed—intervened, the killing would be murder. The malice was implied, because violence was carried too far, or because it was supposed the provocation was seized upon to gratify revenge. Such a homicide may also have been attended with evidences of express malice, as in the preparation for the killing, or the weapon employed, or some other evidence of it." This is a correct, and succinct statement of the principle.

8. There may be some other parts of the charge not reconcilable with the views above expressed, but we suppose what we have said will furnish a sufficient guide on another trial. In charging a jury, respect should be had to the evidence—and instruction should be given on every hypothesis of fact, which the testimony may tend to support. We are pleased to observe that in this case, the old, sound, and much disregarded doctrine, that no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat, has been given in charge, and must have been acted on by the jury. It is to be regretted that this salutary rule is not universally observed by juries, without reference to the social standing of the prisoner.

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Its observance would exert a wholesome restraint on unbridled passion and lawlessness, and would, in the end, preserve to the commonwealth many valuable lives. But this question more frequently arises on the inquiry between self-defense and manslaughter, than between manslaughter and murder. Still, it may arise between the latter.

The judgment of the City Court is reversed, and the cause remanded. Let the prisoner remain in custody until discharged by due course of law.

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Indictment for Larceny of Money paid by Mistake.

1. *Larceny of money paid by mistake; what necessary to constitute.*—Where A. owed B. two dollars, and, in paying him, made a mistake and gave him a one dollar bill, and a ten dollar bill, thinking the latter was a one dollar bill, and B. appropriated the money so overpaid, after discovering the mistake made by A.,—*held*, to constitute larceny in B., he must have known, at the very time he received the money, that he was receiving more than was intended for him, and must then have intended to convert the same to his own use—this would be a fraud amounting to larceny.

2. *Same; what amounts to only a civil tort.*—If the testimony fails to show the intent to convert the money at the time of overpayment, beyond a reasonable doubt, then he is guilty only of a civil tort—trover and conversion.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. JAS. E. COBB.

Defendant, William Bailey, was indicted at the spring term, 1877, of said court, for larceny, the indictment being in the usual form.

The State introduced as a witness the prosecutor, one G. Fuller, who testified that he was indebted to defendant in the sum of two dollars, and upon going to pay said debt, and intending to pay only the two dollars, he paid defendant two bills; that the room where he paid defendant was rather dark, it being cloudy without, and he could not see distinctly, and he made a mistake and gave the defendant a ten dollar instead of a one dollar bill; that next day witness missed a ten dollar bill which he remembered having had before the payment to defendant, so, he went and asked defendant if he did not make a mistake and pay him a ten dollar bill instead of a one dollar bill; and the defendant denied that he was so paid. One Jesse Farmer, another witness for the State, swore that on a certain Sunday before the indictment, he was with defendant and defendant remarked that "he had a secret

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that he would tell witness," and asked witness "if he noticed Fuller when he paid him (defendant), some money on the day before," to which witness replied that he saw no mistake; defendant then said that Fuller had made a mistake, and had paid him a ten dollar bill instead of a one dollar bill. Witness then asked defendant "what he intended to do about it?" Defendant replied that "Fuller had so much money he would never detect the loss, but if he missed the ten dollar bill, he would make it all right with him." Afterwards, defendant told witness he had spent the ten dollar bill. This being all the evidence, the defendant's counsel asked the court, in writing, to charge the jury that "if they believe from the evidence that Fuller, in paying out the money to defendant, made a mistake and paid him a ten dollar bill, then, before the defendant can be convicted of petit larceny, the evidence must satisfy the jury, beyond a reasonable doubt, that, at the time the mistake was made, the defendant knew of the mistake, and with that knowledge received the ten dollar bill, and that any subsequent appropriation of the money by defendant, without a knowledge of the mistake at the time it was made, will not constitute the offense of petit larceny." The court refused to give the charge, and defendant's counsel excepted.

The defendant now appeals, upon the record, to this court.

OLIVER & GARRETT, for appellant.—1. The charge being for larceny, necessarily involves a trespass, accompanied with an intent to deprive the owner of his ownership in the property. Bish. Cr. Law, vol. 2, p. 675 and notes.

2. In order to constitute the offense of larceny, the taking, and the intent *animo furandi* must coexist in point of time. It is not sufficient that the intent to convert it to his own use by the defendant was entertained at the time of the conversion, but as stated in *Wilson v. People*, 39 New York, 459, "In larceny, the intent to steal must exist at the time of taking the property; it is not enough that the prisoner have such intent at the time of converting it to his own use. See, also, *State v. Coombs*, 55 Maine, 477; *State v. Brown*, 25 Iowa, 561.

3. The charge asked by the defendant and refused by the court, enunciates the law as stated in *Wilson v. People*, *supra*, and requires the court to instruct the jury that, before they can find the defendant guilty, they must believe from the evidence, beyond a reasonable doubt, that defendant, at the time he received the money, discovered the mistake, and that discovering the mistake at that time, he afterwards, with that knowledge, appropriated the money to his own use. Predi-

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cated as this charge is, upon the proposition of law, that the taking and intent must coexist, and that it is not sufficient that defendant has that intent at the time of the appropriation of the money to his own use, the refusal to give the charge was error.

4. It was necessary that defendant should have discovered the mistake, made in the payment of the money to him, at the time the mistake was made, before any such intent could be formed by defendant as would constitute larceny, by any after appropriation of the money to his own use. Whatever may be the moral turpitude connected with defendant's conduct, it evidently falls short of larceny.

JOHN W. A. SANFORD, Attorney-General, *contra*.

STONE, J.—Larceny is the felonious taking and carrying away of the personal goods of another. To constitute larceny under the undisputed facts of this case, the defendant must have known, at the very time he received the money, that he was receiving too much, and more than was intended for him, and must then have intended to convert the money to his own use. This would constitute the taking such a fraud, as would amount to larceny.—*Rountree v. The State*, 58 Ala. 381.

On the other hand, if the testimony and circumstances fail to establish the facts and intent as above supposed, with such full measure of proof as to leave in the minds of the jury no reasonable doubt of the defendant's guilty knowledge and intent, at the time he received the money, then he is guilty of no crime, but only of a civil tort, known as trover and conversion.—*State v. Hawkins*, 8 Por. 461; *State v. Ware*, 10 Ala. 814; *Spivey v. State*, 26 Ala. 90; *Wilson v. The State*, 1 Por. 118.

The Circuit Court erred in the charge given, and in the refusal to charge as asked. Let the judgment be reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law.

[*Mitchell v. The State.*]**Mitchell v. The State.***Indictment for Murder.*

1. *Oath to jury; what sufficient recital; presumption.*—A recital in the judgment entry that the “jury being duly sworn according to law, the issue well and truly to try, and a true deliverance make, say upon their oaths,” &c., is sufficient. The presumption is that the correct oath was administered, when it appears that the jury was sworn, unless it also appears that a substantially different or defective oath was administered (sustaining Walker's case, 49 Ala. 370; McCallers case, Ib. 40; Crist's case, 21 Ala. 149, 150; Blair's case, 52 Ala. 344; De Bardelaben's case, 50 Ala. 180; Moore's case, 52 Ala. 424; Bush's case, Ib. 13; McNeill's case, 47 Ala. 503; Edward's case, 49 Ala. 334; Atkin's case, in MS.; McGuire's case, 37 Ala. 161; and overruling; Johnson's case, 47 Ala. 31 and 62; Smith's case, Ib. 545; Same, 53 Ala. 486; and Murphy's case, 54 Ala. 178.)

2. *Testimony of expert; physician.*—A physician who has had long experience in the practice of his profession, and a knowledge of the symptoms of the malady of the deceased, is competent to testify as an expert.

3. *Same; what will impair, though not render such testimony inadmissible.*—Where the physician testified that “he would not have come to the conclusion that the symptoms of the sickness and the death of deceased was caused by poison by arsenic, if he had not heard that there was arsenic in the house,”—the force of his testimony would be much impaired by such acknowledgement though it would still be admissible, and for the jury to decide whether it should influence their verdict.

4. *Service of copy of indictment and list of jurors; presumption.*—In the absence of any objection in the court below, or anything in its records showing the contrary, it will be presumed that a copy of the indictment and list of jurors were duly served upon the prisoner before trial, as required by law.

APPEAL from Circuit Court of Bullock.

Tried before Hon. H. D. CLAYTON.

The appellant, Robert Mitchell, was indicted at the fall term, 1877, of said Circuit Court, for the murder of one Isabelle Hooks, by poisoning with arsenic, and on the 30th of April, 1878, was tried and convicted of murder in the first degree; and, on the 2d of May, 1878, was sentenced to be hung—the court fixing Friday, June 1st, 1878, as the day of execution.

On the trial, one Dr. G. A. Tompkins was introduced as a witness for the State, who testified that he had been a practicing physician for forty years, and that he attended deceased in her illness; that when he called to see her she was insensible and sleepless, and that her pulse was rapid; that he gave her some medicine without effect, and she died about twelve hours after he first saw her. He also testified, without objection, that he saw Sam Hooks, her husband, about the same time, and that both Sam and deceased had

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been suddenly and violently attacked, at the same time, with violent cramping in the bowels, vomiting freely a green matter, and purging. The State's attorney then asked witness to give his medical opinion as to the cause of the sickness and death of deceased, to which defendant objected on the ground that sufficient data had not been shown upon which to base a trustworthy opinion—the witness, not having been asked to state all of the symptoms; but the court overruled the objection, and defendant excepted. The witness then gave as his opinion that “the deceased was poisoned by arsenic, and died from the effects of the same.” Defendant's counsel then asked witness if his medical opinion was formed from the symptoms stated, to which witness answered, “No, and that he would not have formed that opinion as to the poisoning by arsenic if he had not been informed that Sam Hooks, her husband, had arsenic in his house for his hogs; but learning this fact, he came to said conclusion from observation of the symptoms of the case.” The defendant then moved the court to exclude the opinion of witness from the jury, upon the ground that it was not, in fact, a medical opinion, which motion the court overruled and defendant excepted. Other evidence, material to a conviction, but not necessary to be here stated, was introduced.

The court charged the jury that, in order to convict, “they must find that deceased came to her death from poisoning by arsenic.”

The defendant now appeals from the judgment of the court below, and makes the following assignments of error:

1. The jury that tried the case was not sworn as required by law.
2. The admission of the evidence of the witness, Dr. Tompkins.
3. The defendant was not served in person with a copy of the indictment and list of jurors summoned for his trial, including the regular jury, as required by law.

FLEMING LEAN, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

MANNING, J.—1. The record in this cause recites that the jury, “being duly sworn according to law, the issue well and truly to try, and a true deliverance to make, say upon their oath, that they find,” &c. No objection was taken to the form of the oath when it was administered; and it does not misdescribe the parties between whom the jury were to decide. The swearing of the jury was, of course, done orally

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in the presence of the judge, the prisoner, the prisoner's counsel, and the audience which is generally assembled on such occasions. All are witnesses to the solemnity; and it almost never happens that it is incorrectly performed, by misreciting the terms of the oath. Ordinarily, only after the verdict has been rendered, and when it is about to be entered on the minutes of the court, is any record made therein of the swearing of the jury; and then the entry made of this is intended to be a record, not of the form of the oath, but of the fact that the jury had been sworn and acted under oath. A well trained clerk, who understands his business, and is duly careful to have the records of his court contain a correct and simple account of its proceedings, would not write more on this subject than that the jury were sworn according to law. And, though the minute entry of this fact is often unnecessarily verbose, it is to be understood only as a record inartificially made, of that fact, unless it appears that it is intended also to set forth the oath itself in the form in which it was taken by the jury. The sum of our decisions on the question of error in swearing the jury is, that the correct oath will be presumed to have been administered, when it appears that the jury was sworn, unless it also appears that one substantially different, or defective, was administered.—*Walker v. The State*, 49 Ala. 370; *Mc-Caller v. The State*, *Ib.* 40; *Crist v. The State*, 21 Ala. 149-50; *Blair v. The State*, 52 Ala. 344; *De Bardelaben v. The State*, 50 Ala. 180; *Moore v. The State*, 52 Ala. 424; *Bush v. The State*, *Ib.* 13; *McNeill v. The State*, 47 Ala. 503; *Edwards v. The State*, 49 Ala. 334; *Atkins v. The State*, in MS.; *McGuire v. The State*, 37 Ala. 161. The cases of *Johnson v. The State*, 47 Ala. 31 and 62; *Smith v. The State*, *Ib.* 545; *Same v. Same*, 53 Ala. 486, and *Murphy v. The State*, 54 Ala. 178, being contrary to the decisions in the cases, *supra*, are overruled. There is no evidence in this record that the oath was not administered in proper form, and the assignment of error thereupon is not sustained.

2. The physician whose opinion was excepted to at the trial, was competent, from his long experience in the practice of his profession, and with the knowledge and information he was shown to have of the symptoms of the malady of the deceased, to testify as an expert. It was for the jury to decide whether his testimony should influence their verdict for or against the defendant.

3. When, on cross-examination, the witness said that, if he had not been informed that there was arsenic in the house, he "would not have concluded that the sickness and death was caused from poison by arsenic, but learning this fact he

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came to the conclusion he did, from observation of the symptoms of the case, and from having heard that Sam Hooks had arsenic in the house;" certainly this acknowledgment greatly impaired the force of his testimony as evidence against the prisoner, but it was not inadmissible. There was no error in the refusal to rule it out.

4. In *Paris v. The State* (36 Ala. 235), in reference to "the silence of the record in the matter of the service of a copy of the indictment, and a list of the jurors, two entire days [now one day] before the trial, and in the matter of a formal arraignment pleaded," this court said, "although these are among the clear legal rights of one who stands charged with a capital felony, still—they are not of that high grade—do not so enter into the essence of the trial by jury, that the record must, in all cases, show affirmatively that they have been observed. When, as in this case, the record affirms that the prisoner being brought to the bar pleads not guilty, and thereupon a jury is empaneled and the trial progresses in usual form to a verdict of guilty, and sentence of the law pronounced thereon, . . . [and] no objection or exception appears to have been made in the court below, questioning the regularity of any preliminary step in the prosecution, we but conform to our former decisions, in presuming that all has been regularly done which does not appear by the record to have been otherwise." Numerous cases are cited to support this ruling; and we have heretofore readopted it and overruled *Robertson v. The State* (43 Ala. 325) so far as it lays down a different rule in respect to service of a list of the jurors upon the prisoner. According to the present record, an order was made, after arraignment and plea, setting a day for the trial and ordering the sheriff to summon fifty jurors besides those on the regular panels for the week, and that a list of the jurors and copy of the indictment be served on the prisoner, &c.; and it is further recited that the sheriff returned into open court a *venire* of fifty persons in addition to the regular panels, "from which was duly selected, empaneled, and sworn, a jury to try this case." No irregularity in this matter was complained of in the court below, and the presumption is that there was not any.

The judgment of the Circuit Court must be affirmed. And inasmuch as the execution of the sentence of said court was suspended until the determination of this court be had upon the appeal to it, and the day appointed for such execution has elapsed, now, in obedience to the statute in such case made and provided, this court orders that the sentence of the Circuit Court be executed, according to law, on Friday, the twenty-third day of August next, in the present year.

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[Spigner v. The State.]

Spigner v. State.*Indictment for Burglary.*

1. *Charge that the jury should acquit on the evidence ; when not error to refuse.*—It is not error to refuse to instruct the jury that the prisoner is entitled to an acquittal on the evidence, unless it is of so weak and indeterminate a character that the presiding judge would feel it his duty to set aside a verdict of guilt based on it.

2. *Question to prisoner, "whether he has anything to say," &c.; recitals of the record ; when case not reversed.*—Before sentence, on conviction of felony, the prisoner must be asked if he has anything to say why the sentence of the law should not be pronounced upon him. The main purpose of the inquiry is to allow the prisoner an opportunity to make any motion which will prevent judgment; hence, where the record shows that after verdict, the defendant moved in arrest of judgment and for a new trial, such recital shows that the defendant got the benefit of the rule, and that the question must have been, in substance, propounded to him.

APPEAL from the Circuit Court of Chilton.

Tried before the Hon. JOHN HENDERSON.

The following proceedings were had on the trial of this cause :

Issue was joined on the plea of *not guilty*. George Payne, a witness for the State, testified that about the 19th day of December, 1877, he retired to bed about 9 o'clock at night ; that he had about fifty dollars in his pocket ; that defendant was in his employ ; that before retiring he was exhibiting an old Mexican dollar, that was with the money, to his sister-in-law, who was living with witness, in full view from a room in which the defendant then was ; that there were several rooms in the house ; that when witness retired he put his pantaloons (in the pocket of which was the money) near the window ; that his custom was to lock the outside doors of the house, but he could not say that the outside doors were locked that night, but that the doors and windows of the room in which he slept were closed before he went to bed ; that when he got up the next morning, all the money was gone from his pantaloons pocket except the Mexican dollar ; early in the morning he informed his sister-in-law—no one else—of the loss of his money ; a few days afterward, one B. L. Tarver returned witness some money, which Tarver said he had gotten from persons who had gotten it from defendant, but the witness could not identify any of the bills as the money he had lost ; that the house in which he was living and in which he lost his money, was in Chilton county ; that

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defendant had been in the employ of witness some time, and was well acquainted with the house, and while so employed he had paid defendant only \$5. Witness further testified that his wife and sister-in-law staid in the house that night; that he saw no signs of his house having been broken open and entered, and he could not say whether his house had been broken into and entered.

B. L. Tarver, a witness for the State, testified that some days after the money was said to have been taken or lost, he arrested the defendant and carried him to the store of one Captain Norton, and asked Norton, in defendant's presence, if defendant gave Norton any money, and Norton gave witness a ten dollar bill, which he then said he got from defendant. Witness asked Norton if he had found any more money. He said he had found five dollars more, which he had given to Tom Spigner, a brother of defendant. Witness then went with defendant to Tom Spigner's, who, in defendant's presence, gave witness a five dollar bill that Tom Spigner said defendant had given him. Witness then said to defendant, "You took more money than this." Defendant replied that he had not taken any money, but had found fifteen dollars.

One Simmons, another witness for the State, testified that in December, 1877, he lived on an adjoining lot to George Paine's, and that defendant was living with Paine; that very early one morning, a day or two before he heard of the loss of Paine's money, he saw defendant on Paine's lot, when defendant asked witness if he had heard of the "Captain's great loss." Witness said he had not. Defendant said that the Captain had lost about forty-two dollars, and asked witness what he would do with the money if he should find it; would he (witness) give it to the Captain? Witness said he *would*—but he thought the Captain ought to give him the two dollars for finding it. Defendant then said that if *he* found it he would keep it.

Tom Spigner, another witness for the State, testified that a short time before he heard of the loss of money by Captain Paine, the defendant let witness have a five dollar bill; that defendant had other paper money at the time, but witness did not know the amount or number, or denomination of the bills; that defendant had it rolled up in his hand.

Defendant was about fifteen years old.

The foregoing is all the evidence set out in the bill of exceptions.

The defendant asked the court, in writing, to charge the jury, "That if they believe the evidence, they must find the

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defendant not guilty;" which charge the court refused, and defendant's counsel excepted.

The jury brought in a verdict of guilty. The defendant then moved in arrest of judgment, and for a new trial, on the ground that the verdict was contrary to the law and the evidence, which motions the court overruled, and defendant excepted.

The court sentenced the prisoner to the penitentiary for two years. The judgment entry does not recite that the defendant was asked, if he had any thing to say whether sentence of the court should not be pronounced, but sets out the other proceedings and motions made by defendant.

Defendant appeals on the record.

WM. A. COLLIER, for appellant.—1. The record does not affirmatively show that before sentence was pronounced the defendant was asked, if he had any thing to say why the judgment of the law should not be pronounced against him. To sustain a conviction for felony, this must so appear from the record.—*Crim v. State*, 43 Ala. 53.

2. The record does not affirmatively show that the prisoner was personally present in court when sentence was pronounced upon him. This the record must do upon conviction of felony.—*Peters v. State*, 39 Ala. 681.

3. The *corpus delicti* not having been proven, as charged in the indictment, the conviction is illegal.—*Stark. Ev.* 9th ed. § 862.

4. Even if the *corpus delicti* be established, the State having failed to connect the defendant therewith, the conviction is erroneous.—*Greenleaf's Ev.* 7th ed. § 30.

5. The State not having proved, beyond a reasonable doubt, that the defendant was guilty as charged in the indictment, the defendant should have been acquitted.—*Murler v. State*, 2 Ala. 43.

6. This being a clear case, and one in which the jury could not legally bring in a verdict of guilty, the charge asked and refused should have been given.—*Sanders v. State*, present volume.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. It does not appear that before sentence was pronounced, the prisoner was asked whether or not he had any thing to say "in bar or preclusion thereof."—Perry's case and Crim's case, 43 Ala. pp. 21 and 53, hold that such an omission is fatal to an affirmance of the judgment. But in Ely and Aaron's case, 39 Ala. 684—and Taylor's case, 42 Ala. 529—it was held that, unless the record affirmatively showed the question was not

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asked, the court would presume that it was.—*Paris v. State*, 36 Ala. 632; Ben's case, 22 Ala. 9; William's case, 3 Stew. 454; Harrington's case, 36 Ala. 236.

2. The record shows that the prisoner was in court when the trial was had and the sentence pronounced. The jury alone could determine the sufficiency and credibility of the evidence. If the testimony convinced the jury that the money owned by Payne had been stolen by the accused—unless some misconduct on the part of the jurors were shown—the court would not disturb the verdict. The motion for a new trial was properly overruled in the court below, and its action is not reversible here.

STONE, J.—The charge asked should not have been given. The testimony was not of so weak and indeterminate a character, as to require the court to pronounce its insufficiency as matter of law. Though circumstantial in all that tended to connect the defendant with the offense, it was sufficient to go before the jury to be weighed by them. In no case should the presiding judge charge on the effect of the evidence, and pronounce it insufficient to support a verdict of guilty, unless, on conviction on such testimony, he would feel it to be his duty to set aside the verdict, as not warranted by the evidence. Such is not the case in this record.

2. There was a rule of the common law, that before sentence, on a conviction of felony, the prisoner must be interrogated by the court, whether he has any thing to say why the sentence of the law should not be pronounced upon him. 1 Bish. Cr. Proc. § 1118. And this court, in *Crim v. State*, 43 Ala. 53, announced that doctrine. We have no desire to re-examine the question at this time. The main purpose of the inquiry and the rule is, that the prisoner, before sentence, may have afforded to him the opportunity to make any motion which will prevent judgment. The record informs us that after the coming in of the verdict, the defendant made two motions: one in arrest of judgment, and the other for a new trial, which were severally overruled by the court. These are the motions most usually made after verdict, and we think the recital that these motions were made, proves that the usual question must have been in substance propounded, and that, in fact, the prisoner had accorded to him substantially, all the rule was intended to secure. It would look like child's play to remand this cause, when the only effect could be to propound the question to the prisoner, receive his answer that he had nothing further to offer, and then pronounce the sentence of the law on the verdict of guilty

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heretofore rendered by the jury, and which is free from error.
Burch v. State, 55 Ala. 136.

Affirmed.

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Indictment for Larceny by Finding.

[HEAD NOTES TO OPINION DELIVERED BY MANNING, J.]

1. *Bill of exceptions; evidence set out therein.*—Where certain evidence is set out in the bill of exceptions, but it is not expressly stated that such is all the evidence given, this court cannot hold that the bill of exceptions contains all of the evidence.

2. *Larceny by finding; what constitutes.*—Where one was charged with the larceny of a sack of coffee picked up or found by him in a public road—*held*, that if the defendant feloniously took and carried away the sack of coffee from the public road, knowing when he took it, or having immediate means of ascertaining or finding out, who the owner was, he is guilty of larceny.

3. *Same.*—The finder of an article lost on a highway has a right to it against everybody except the true owner, and may take and carry it away, and a subsequent appropriation of it by him is not larceny, though he may then know the owner; but if he takes it, even from a highway, *animo furandi*, with the intent to steal it at the time of the taking, he is guilty of larceny.

4. *Same; proof of intent to steal.*—Guilt must be proved by evidence showing that the intent to steal accompanied the act of taking, and that the conduct of the accused showed a larcenous character from the beginning, and that, at the time of the finding, he knew, or had then the means of knowing, from marks about the property, or otherwise, who was the owner.

5. *Same; finding in a highway distinguished from finding under other circumstances.*—A distinction is made between cases of finding an article dropped in a highway, or other place in which it is manifestly lost, and a place in which it is unintentionally left or dropped by the owner—for, if there be no such evidence indicating to the finder, at the time of the taking of the chattel, to whom it belonged—if he did not otherwise know it—the law presumes the taking was innocent and lawful.

6. *Charges; when properly refused—proof sufficient to convict.*—Where the defendant asked charges founded on the idea that to make the defendant guilty of larceny “he must, at the time of taking the sack of coffee, have known who the owner was; or, there must have been marks upon it, by which he could then be known,” *held* that such charges state the principle—in the second condition—too narrowly, and are, therefore, properly refused. The defendant may be found guilty—other things being sufficiently proved—if he has the present means of knowing who the owner is, or if, when he takes the goods into his hands, he sees about them any marks, or otherwise learns any facts, by which he knows who the owner is.

[HEAD NOTES TO OPINION DELIVERED BY BRICKELL, C. J.]

1. *Larceny by finding; duty of finder.*—If the finder of lost goods knows the owner, or, from the facts and circumstances attending the finding, or, from

*(NOTE BY REPORTER.—The judges all concurred in affirming the judgment of conviction; but Judges BRICKELL and STONE did not concur in the reasoning employed, or, in the principles of law stated by Judge MANNING, so far as they are variant from the opinion delivered by BRICKELL, C. J.)

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96	425
58	425
100	16
88	425
108	44
58	425
180	61

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his previous acquaintance with the goods, or, from marks or other *indicia* on them, he has the immediate means of ascertaining the owner, it is his duty, legal and moral, to restore them to the rightful owner, and not to appropriate them absolutely to his own use, for if he does so appropriate them he is guilty of larceny.

2. *Place of finding; material to what extent.*—The place of finding is material only in determining whether the goods are lost, or mislaid, or left by mistake of the owner under circumstances which would enable him to return for them.

3. *Taking goods mislaid or left by mistake; when larceny.*—The taker of goods mislaid or left by mistake, is guilty of larceny by an appropriation or conversion of them to his own use, whether the intent to steal was formed at the time of, or subsequent to the taking.

4. *Larceny committed in any place; character of taking; when not changed.*—Larceny may be committed in any place, public or private, in a highway or in the dwelling of the owner; and the approved definition of larceny as given by Mr. East, (2 East, P. C. 553) is applicable as well to goods lost as to any other, and the place where the goods are found is immaterial, because such definition extends to the taking and carrying away of goods "from any place." The owner is not, by the loss at any place, divested of the right of property, which right draws to it constructively the right of possession.

5. *Trespass as an ingredient; distinction between taking by finding and by trespass.*—The finder of lost goods does not commit a trespass in taking possession of them; there is no violation of the owner's right of property nor invasion of his possession. Larceny generally includes a trespass, but every trespass is not larceny, and whether it amounts to larceny depends upon the intent at the time, or on the subsequent conversion. If possession is obtained by a trespass it is not material whether the *animus furandi* then existed or was subsequently formed, while if possession be obtained by finding, the intention to steal must exist at the time of the finding.

6. *Felonious intent must co-exist with the finding; question for the jury.*—If, at the time of the finding, the felonious intent does not exist, though there may be a subsequent concealment of the goods, or a denial of all knowledge of them and a fraudulent appropriation of them, it is not larceny. Whether the criminal intent co-existed with the finding is a question for the jury, to be ascertained by a careful examination of the facts and circumstances attending and immediately following the finding.

APPEAL from the City Court of Eufaula.

Tried before the Hon. ALPHEUS BAKER.

Defendant, Anderson Griggs, was indicted for stealing a sack of coffee, the personal property of one Calvin W. Fenn—the indictment being framed in the usual way. Trial was had on the plea of "not guilty," and defendant was convicted and (the offense being grand larceny) was sentenced to imprisonment in the penitentiary for three years.

On the trial, the State introduced one Jim James, as a witness, who testified, that some time in the fall of 1877, he was carrying some goods, the property of said Fenn, on a wagon, from Eufaula to Clayton, in Barbour county, among which goods was a sack of coffee—the property alleged to have been stolen; that after he had gotten about two miles from Eufaula he jumped out of the wagon and adjusted the load, and noticed the said sack of coffee in the wagon; that after driving another mile, and, while ascending a hill, he discovered that said sack of coffee was missing; that he drove up the hill and called to one Sam Tullis, who was

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driving another wagon, and told Tullis to stop, that he (James) had lost a sack of coffee; that he then took out one of his mules and rode back on the public road to look for his coffee, and after riding several hundred yards he came to defendant's wagon, standing near a gate that led by a private road into the woods from the public road, which private road led to defendant's house. He saw defendant standing in the edge of the woods some distance from the public road, and defendant seemed to be peeping at him; that he called defendant down to the public road and asked him if he had seen anything of a sack of coffee that he (witness) had lost from his wagon; that defendant said he had seen nothing of it; that witness, Tullis, and defendant, then looked for the coffee along the public road and in the woods near by, but could not find it; that he (witness) then told defendant that no one had passed along the road but him (defendant), and that he (defendant) must know where the coffee is; that he (witness) then noticed some red dirt (like that of the public road) on defendant's shoulder, which caused him to smell of defendant's shoulder, and he detected the odor of coffee; that defendant said he did not have the coffee, and had not seen it, and further said that he had been pretty much in sight of witness' wagon all the way from Eufaula, until he (defendant) turned out to go to Reeves' gin-house after cotton seed, and that he had come from town with a Mr. William Harrison; that his wagon had cotton seed in it; that he stopped his wagon at the gate and went up into the woods to look for lightwood, and let his wagon stand in the public road because if he turned his steers in the gate they would go home. Witness further testified that the road to Reeves' gin-house was between Eufaula and the Barbour bridge, and about half a mile from the bridge; that he had not seen defendant after leaving Eufaula; that defendant was not in sight of witness' wagon, nor did witness ever see the defendant until the coffee was lost; that he did not see any one after crossing the Barbour bridge until he discovered that his coffee was missing; nor had any one passed him, going the other way.

Sam Tullis, as a witness for the State, corroborated the testimony of Jim James.

The State then introduced said Calvin W. Fenn, who stated that the coffee lost was his property, and was worth about thirty-four dollars, and that Jim James was hauling said coffee, with other goods, along the public road, from Eufaula to Clayton.

William Harrison, being sworn by the State, testified that having heard of the loss of the sack of coffee, he started out

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to hunt for it; that it was found about fifty yards beyond the gate through which defendant had to go, and that defendant was not obliged in going home to pass by the place where the coffee was; that defendant did not come from Eufaula with witness, and that witness did not see defendant that day; that the coffee was found just over the fence by the big road, lying by some bushes, though not concealed; that if the coffee had been in the road opposite the place where found, it could have been seen from where defendant's wagon was standing.

The above is, substantially, all of the evidence which is set out in the bill of exceptions.

The court charged the jury as follows: "The defendant is indicted for grand larceny, and if you believe beyond all reasonable doubt that the defendant feloniously took and carried away from the public road in Barbour county the sack of coffee as charged in the indictment, and that it was the property of Calvin W. Fenn, and over the value of twenty-five dollars, and that defendant knew when he took it who the owner was, *or if he did not know but had immediate means of ascertaining or finding out who the owner was*, then he is guilty as charged. But if you believe that, though defendant took the coffee, that at the time of the taking he did not intend to steal it, then you must find him not guilty."

Defendant excepted to that portion of the above charge which is in italics.

Defendant then asked the following written charges: 1. "If the jury believe from the evidence that if at the time defendant found the sack of coffee in the highway he did not know who the owner was, he is not guilty."

2. "Before the jury can convict, they must be satisfied from the evidence that the defendant feloniously took and carried away the sack of coffee from the highway where it was dropped, and that at the time he so took it and carried it away, he knew who the owner was, or that there were marks upon it by which the owner could be known; and if both these facts are not proved beyond all reasonable doubt, the jury must acquit."

3. "If the jury believe from the evidence that the defendant found the sack of coffee on the highway and took it up and put it over the fence, and at that time did not know the owner, and that no marks were on it by which the owner could be known, and that afterwards he did find out who the owner was, but failed to show where the sack of coffee was, the jury must find the defendant not guilty."

4. "Unless the jury believe from the evidence, beyond all reasonable doubt, that at the time defendant took up the

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sack of coffee and put it over the fence (if the jury believe he did so take it) that he, the defendant, did not know the owner, and that no marks were upon it by which the owner could be known, they must find the defendant not guilty."

The court refused each of said charges, and defendant's counsel reserved exceptions.

The giving of the charge by the court, and the refusal of the charges asked by defendant, are now assigned as error.

G. L. COMER, for appellant.—The court erred in charging the jury that they could convict the defendant whether he knew who was the owner of the sack of coffee or not, if he had immediate means of ascertaining who the owner was, and in refusing the charges asked by appellant.—2 Bish. Cr. L. § 841-860; *People v. Cogdell*, 1 Hill (N. Y.) 94; *People v. Anderson*, 14 Johnson, 294; *Reg. v. Dix*, 36 Eng. L. & Eq. 597; *State v. Conway*, 18 Mo. 597; *Randall v. The State*, 4 S. & M. (Miss.); *Murray v. The State*, 18 Ala. 727.

JOHN W. A. SANFORD, Attorney-General, *contra*.—The court did not err in its charge.—*People v. McGarsen*, 17 Wend. 460; *State v. Pratt*, 20 Iowa, 267.

MANNING, J.—1. Appellant was indicted for the larceny of a sack of coffee. It had dropped from a wagon-load of goods while being hauled from Eufaula to Clayton, about twenty miles distant, along a highway in Barbour county, and was not long afterwards, on the same day, found, between three and four miles from Eufaula, just over a fence by the highway, and near some bushes, about fifty yards beyond a gate at which defendant's ox-wagon was standing, and through which he had to pass on his way home with his wagon. Some circumstances were proved tending to show defendant had put the sack where it was found; but he denied that he had seen it or knew anything about it. It was proved that he said he had been "pretty much in sight" of the wagon from which it was dropped, from Eufaula for about a mile or more, where he had turned off to a gin-house to get some cotton-seed, which he had in his wagon; but the driver of the other wagon, who had, after this, seen the sack of coffee in it, testified that he "had not seen defendant since he left Eufaula, that he was not in sight of witness' wagon, nor did witness ever see or hear defendant, or his wagon, until after the coffee was lost." There is no evidence in the record that there was any mark on the sack of coffee, or other *indiciu*m, by which the owner could be known, or any other evidence than that mentioned above, that defendant

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knew who the owner was. But it is not expressly said in the bill of exceptions, that it contains all the evidence given, and, therefore, we cannot, according to the decisions of this court, hold that it does.

2. There is no error in the charge that was given by the judge to the jury. If the defendant feloniously took and carried away the sack of coffee from the public road, and knew when he took it who the owner was, or had immediate means of ascertaining or finding out who the owner was, then he was guilty of larceny thereof. It seems to have been formerly held in England, and is still, or lately, was held in one or two of the States of this Union, that the finder of an inanimate chattel that was really lost could not be found guilty of stealing it. "Lord COKE lays down the law as drawn from the year books, (3 Inst. 107) to be, that if one lose his goods and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny." So, "in 2 East's P. C. 663, it is expressly stated that where one finds a purse in the highway, which he takes and carries away, it is no felony, although it may be attended with all those circumstances which usually prove a felonious intent, such as denying and secreting it." In the *People v. Anderson* (14 Johns. R. 296) from which the foregoing extracts are taken, the defendant was indicted for stealing a trunk, which (it was believed) had fallen from a stage-coach on the highway and been found by him. The court below instructed the jury that if he took the trunk with intent to steal it, they ought to find him guilty; and that in determining that question, they had a right to take into consideration the prisoner's subsequent conduct as well as all the circumstances in the case. The Supreme Court of New York reversed the judgment, and said: "The *bona fide* finder of a lost article, or of a lost trunk containing goods, cannot be guilty of larceny by any subsequent act of his in concealing or appropriating to his own use, the article or the contents of a trunk thus found.

There can be no trespass in taking a chattel found in the highway, and the finder has a right to keep the possession against every one but the true owner. How, then, can it be that a thing found *bona fide*, and of which the finder has a right to take possession, shall be deemed to be taken feloniously, in consequence of a subsequent conversion, by denying and secreting it with an intention to appropriate it to the use of the finder." See, also, *The People v. Cogsdale*, 1 Hill, 46; *Laurence v. The State*, 1 Humph. 228; *Porter v. The State*, Mart. & Yerg. 226. By the words *bona fide* in the passage above, the court meant *really, truly*—that is, if the trunk had not been taken from the stage coach, but had *truly*

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dropped from it in the public road, and been there *really* found by the prisoner.

3. The idea was, that the finder of an article lost on a highway, has a right to it against every body else than the true owner, and may take it and carry it away. And if he subsequently appropriates it to his own use, he does not thereby subject himself to punishment as a thief, although he may know, when he does so, who the owner is. This is in law a conversion only, very dishonest, it is true, but not larceny. The prevailing doctrine, though, is that if he take it even from a highway, *animo furandi*, with the intent to steal it, and this intent exists when he takes it, he is in law guilty of larceny.

4. But how shall a jury know whether or not the intent to steal existed at the time of the taking? The law, in its humanity, requires them to presume any one on trial before them to be innocent. The guilt of the accused must be proved; and it must be proved by evidence showing that the intent to steal accompanied the act of taking, and stamped a larcenous character on his conduct from the beginning. If, at the time of finding it, he does not know, or have the immediate means of knowing whose it is, evidence of a hiding of the article or of a disposing of it, afterwards, though only a very short time afterwards, is evidence of the intent then existing, in a mind that, perhaps, has just yielded to and been overcome by the temptation produced by possession and a reluctance to surrender what had not been dishonestly obtained. But such misconduct, especially after the owner is known, is, in the apprehension of those who have had proper moral training, so little better than larceny, that upon proof of it, a jury would generally be inclined to convict. And yet the defendant might, consistently with all such evidence, have had no intention to steal the article when he found it. The law, therefore, requires that it be further shown that defendant, when he found the article, knew who the owner of it was, or had then and there the means of knowing whose it was. Says Mr. Bishop (in the 6th ed. of his Commentaries on Criminal Law): "A man knowing the owner of goods cannot lawfully pick them up without returning them to him; but a man not knowing the owner can. The doctrine, therefore, is, that if, when one takes goods into his hands he sees about them any marks, or otherwise learns any facts, by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny, otherwise not. Some of the cases say if he knows who the owner is *or has the means* of ascertaining; but the better doctrine is, as before set down, because every

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man, by advertising and inquiry, can find the owner, if he is to be found, while the guilt of the defendant must attach at the moment, if ever."—2 Vol. § 882. The doctrine above laid down is that of the case of *Regina v. Thurbourn*, 1 Denn. C. C. 387; (2 Leading Crim. Cases, 18) in which Baron PARKE delivered a long and well considered opinion. A like conclusion was reached in *Tanner's case*, (14 Grattan), by the Court of Appeals of Virginia, after a thorough examination of the cases, including those mentioned in the elaborate note to *Regina v. Preston*, 2 Lead. Crim. Cases, 31. "We have seen," says ALLEN, president of the court, "from the authorities, that where there are no *indicia*, by which the owner can be found, the appropriation to the finder's use does not amount to larceny; for, as it has been held, the finder of a chattel actually lost, is not bound to take any means to discover the owner. He must know him immediately from marks about the property or otherwise." And in a case like the present, it cannot be held that he is bound to wait by the lost goods to see whether the owner will not return for them. Peradventure, the person from whose wagon this sack of coffee dropped, might not have discovered the loss of it till his arrival at Clayton. In *Commonwealth v. Titus*, (16 Mass. 42), the Supreme Judicial Court of Massachusetts recognized a like doctrine, namely, that it should be shown that, when the article was found, it was taken by the finder, *animo furandi*, and also that he then knew or had reasonable means of knowing or ascertaining who the owner was. Said GRAY, C. J.: "The instruction given did not require the jury to be satisfied merely that the defendant might have reasonably ascertained it, but that at the time of the original taking, he either knew or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession, or reach, at that time."

5. A distinction is made by the courts, between cases in which an article is dropped in a highway, or other place in which it is manifestly lost, and those in which it is intentionally left or dropped by the owner in other places—as on a table in a barber's shop, or in a garden of the owner, or in the prisoner's store, or by a departing guest at his hotel. Speaking of such, PARKE, Baron, said: "Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict."—*Regina v.*

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Thurbor, supra. But where the goods are found in a highway, (as is said in the note to *Regina v. Preston*, 2 Leading Crim. Cases, p. 34), "if there are no marks upon the property or other *indicia*, by which the owner can be found, the appropriation to the finder's use does not amount to larceny, although he knew the property was not his own." See, also, *Lane v. The People*, 5 Gillman, Ill. 305, in which it is said: "These authorities proceed on the principle that there cannot be a felonious intent in taking a chattel from the highway, which has no marks about it to designate the owner, the finder in such case having the right to take and retain the possession against every one but the owner." Perhaps it would be more correct to say, that, without some such evidence indicating to the finder at the time of the taking of the chattel, whose it was, if he did not otherwise know it, the law presumes that he took it, innocently and lawfully, because he might do so. By departing from this rule we should obliterate a well defined boundary, on one side, of the crime of larceny. It is wrong in policy and in law to substitute vague ideas in the place of a clear criterion, to juries that have to consider the evidence in such cases. And if we resolve to do so, it seems to me, that to be consistent, we ought to go yet further, and disregarding precedents, decide that the finder of a lost chattel shall be held to be a bailee of it for the owner, and like a hirer, who knows the owner of the property he is getting, and by his own act procures it from him, must be held to have obtained it in the first instance with a felonious intent, if he afterwards appropriates it to his own use. But the hirer, in such a case, not only converts the chattel to his own use, but perfidiously breaks the plighted faith implied in the contract of bailment, that he will return it; for which reason he may well be supposed to have gotten it with a felonious intent.

6. The charges asked for defendant, and refused, all are founded on the idea, that to make the defendant guilty of larceny, either he must at the time of taking the sack of coffee, have known who the owner was, or that there must have been *marks upon it* by which he could then be known. The second condition is too narrowly expressed. The defendant, according to the rule laid down, may be found guilty—other things being sufficiently proved—if he has the present means of knowing who the owner is, "by marks on the goods, or otherwise," or, according to Bishop, if, when he takes the goods into his hands, he "sees about them any marks, or otherwise learns any facts, by which he knows who the owner is." It is thus implied that such knowledge may be obtained otherwise than by marks only on the goods.

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Consequently there was no error in refusing those charges. Let the judgment of the City Court be affirmed.

BRICKELL, C. J.—1. It seems at one time to have been a generally received opinion that lost goods were not under any circumstances the subject of larceny. Whether a careful and just examination of the older authorities would support the opinion, is not now matter of importance. If it ever prevailed, it must have been admitted with the limitation expressed by Lord Hale, who says: "This taking of *treasure-trove*, waif, or stray, must be when the party that takes them, really believes them to be such, and colours not a felonious taking under such a pretense, for then every felon would cover his felony with that pretense."—1 Hale, Pleas of the Crown, 506; 2 Russ. Crimes, 12. The doctrine has been repudiated in England, and it never found the least countenance, so far as we can discover, in but two cases in this country, the one in Tennessee, (*Porter v. The State*, M. & Yerg 226,) and the other in New York, (*People v. Anderson*, 14 Johns. 293). The decision in Tennessee rests on the reasoning that as a trespass is not committed in taking goods lost they are not the subject of larceny. The same reasoning has led the same court to the anomalous ruling, that if goods are fraudulently obtained under a pretense of hiring, but with the intent of stealing, and selling them, there can be no larceny, as there was no trespass committed in obtaining possession.—*Felter v. State*, 9 Yerg. 297. The New York case was decided by a divided court, (THOMPSON, C. J., dissenting), and has not been approved by other courts. *Tanner v. Commonwealth*, 14 Gratt. 635; *Ransom v. State*, 22 Conn. 153. It is said of this case, in *People v. Swan*, 1 Park. Cr. Rep., by WILLARD, J., that the particular facts are not detailed, but it is assumed that the owner had lost the goods, and that the defendant was an honest finder. And in *People v. McGarren*, 17 Wend. 463, it is said of it, that it did not appear that the defendant knew, or had the means of knowing, who was the owner of the property. There can be no other ground on which the case can be supported. The finder can not be honest, if he knew, or from the facts and circumstances attending the finding, or from his previous acquaintance with the goods, or from marks or other indicia on them, he has the immediate means of ascertaining the owner. It is then his duty, legal and moral, not to appropriate them absolutely to his own use, or to convert them, but to restore them to the rightful owner. This seems to us unquestionably the doctrine in England, since the case of *Regina v. Thurbourn*, 1 Den. C. C. 387, in which PARKE, B.,

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after referring to the older authorities, says: "It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken out and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner, or there is any mark upon them presumably known by him, by which the owner can be ascertained." In the conclusion of his opinion, it is said: "The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner can not be found, it is not larceny. But if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." Later English cases, while not agreeing with some of the reasoning, and some of the principles stated by the learned Baron, have fully recognized the doctrine that lost property is the subject of larceny. In *Regina v. Christopher*, Bell, C. C. 22, referred to in 2 *Heard's Lead. Cr. Cases*, 424, it is said by HILL, J., that "two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown that, at the time of finding, he had the felonious intent to appropriate the thing to his own use; and this is founded on the rule laid down by Lord COKE, and referred to and acted upon in *Regina v. Thurbourn*. The other ingredient necessary is, that at the time of the finding he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it, but it is not sufficient that the finder may think that by taking pains the owner may be found; there must be the immediate means of finding him."

2. Before and since these decisions, the courts of this country have made no other distinction between goods lost, and those in any other situation, than that, at the time of the finding the intent to steal must exist, and the finder must know, or have the reasonable means of knowing or ascertaining the owner.—3 *Green. Ev.* § 159, and authorities referred to in the notes; 2 *Heard Lead. Cr. Cases*, 423-432; 2 *Bish. Cr. Law*. §§ 878-883; *Commonwealth v. Titus*, 116 *Mass.* 42. The place of finding is material only in determining whether the goods fall in the category of lost goods, or of goods merely mislaid, or put down and left by mistake of the owner, under circumstances which enable him to know where

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they were, and at a place to which he would naturally return for them.—*Lawrence v. State*, 1 Hum. 228; *Pritchett v. State*, 2 Sneed, 285; *Pyland v. State*, 4 Sneed, 357; *State v. Brick*, 2 Harrington, 530; *People v. McGarren*, 17 Wend. 460; *Regina v. Kerr*, 8 Carr. & Payne, 176; *Regina v. Peters*, 1 Carr. & Kir. 245; *Cartwright v. Cartwright*, 8 Vesey, 406; *Merry v. Green*, 7 Mees. & Wels. 623.

3. The taker of goods mislaid, or left by mistake, is guilty of larceny by an appropriation or conversion of them to his own use, whether the intent to steal was formed at the time of or subsequent to the taking.

4. Larceny may be committed in any place, public or private, in a highway, or in the dwelling of the owner. In *Ransom v. State*, 22 Conn. 156, the court quotes, with approbation, the definition of larceny, as given in 2 East, P. C. 553, which Professor Greenleaf says, is the most approved definition: "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner."—3 Green. Ev. § 150. The court proceed to say, each branch of this definition is strictly, and according to the meaning which has been uniformly attached to it by judicial construction, applicable as well to goods lost, as to any other." And further, the court say: "It is certainly not impossible, from the nature of the case, for a person who discovers the goods of another which have been lost in a highway, or any other place, to form a fraudulent intention to appropriate them to his own use, and to take them with that intention. The place where they are found is immaterial, as it respects the offense of larceny, because the definition of it extends to the taking and carrying away of goods "from any place." There is nothing in the circumstance, that they were there, because they were accidentally lost, which any more precludes the possibility of forming such a fraudulent intention, than if they had been placed there designedly by the owner. This is so far from being true, that the very fact, that they were apparently thus lost, and that their location is therefore unknown to the owner as well as others, and also that he is unknown, or the loss undiscovered, may and often does constitute a motive, on the part of the finder, arising from the difficulty of detection, and hope of impunity, which induces him to take possession of the property, and convert it to his own use." Nor does the finder acquire any other or greater right, nor are his duties in any respect changed, because the goods are lost and found in a highway. He may lawfully take possession of them,

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when they are lost, wherever they may be found. And when found, his duty is to keep them for the owner. The owner is not by the loss at any place divested of the right of property, and that right draws to it constructively the possession. The finder, it is true, may retain them against all the world but the owner. So may every other possessor of personal property retain it, however tortiously, or criminally, the possession was obtained, against all but the owner, or some person connecting himself with the title of the owner. 1 Chit. PL 170; 1 Waterman on Trespass, 507; *Tarry v. Brown*, 34 Ala. 159.

5. The finder of lost goods does not commit a trespass in taking possession of them—he does merely a lawful act, though he may know the owner or have the immediate means of ascertaining him. There is no violation of the owner's right of property, nor invasion of his possession. Larceny generally includes a trespass; yet every trespass is not larceny. Whether it is larceny, depends on the intent at the time of its commission, or on the subsequent fraudulent appropriation and conversion of the goods. If possession is obtained by a trespass, it is not material whether the *animus furandi* then existed, or was subsequently formed. *Commonwealth v. White*, 11 Cush. 483; *State v. Coombs*, 55 Maine, 477. A distinction arises between the taking of lost goods, and a taking by a trespass—the intention to steal must exist at the time of the finding—no subsequent formation of that intention will convert the taking into a felony, though the owner be known.—2 Heard's Lead. Cr. Cases, 425.

6. If at the time of the finding the felonious intent did not exist, though there may be a subsequent concealment of the goods, or a denial of all knowledge of them, and a fraudulent appropriation of them, the offense is not larceny. Whether the criminal intent coexisted with the finding, is a question for the jury. It may be a question of difficulty, but it is to be ascertained by the jury just as the intent with which any act is done is ascertained—by a careful examination of the facts and circumstances attending and immediately following the finding. We quote again from the case of *Ransom v. State*, *supra*, “for the purpose of showing such intention, inquiries as to his” (the finder's) “conduct, and all the circumstances preceding, accompanying, or following such taking, so far as they are relevant, are, as in all other cases of a similar accusation, admissible; and when the goods were obtained by finding, it is from the nature of the case, very important to ascertain, whether the accused knew, or had the means of knowing, the owner, or endeavored to discover him, or made known or concealed his acquisition;

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and, generally, how he conducted with the goods, in order to determine whether he intended originally to convert them to his own use, or to restore them to the owner. No arbitrary or artificial importance or effect is attached to these circumstances, when they are disclosed by the evidence; they are only evidential of the intention of the accused, and, as such, to be weighed by the jury."

We all concur in affirming the judgment of conviction; but a majority of the court do not concur in the reasoning employed, or in the principles of law stated by our brother MANNING, so far as they are variant from this opinion.

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Action for Conversion of Crop on which Plaintiff Claims Lien for Rent.

1. *Several instruments relating to one contract; construed together.*—Where a bond for title is given, and written instruments are executed whereby a purchaser promises to deliver three bales of cotton annually, as the consideration of the purchase of lands, and they concern the same subject matter, the endorsements thereon being simultaneously executed, they must be construed together as if they were a single instrument.

2. *Contract in the alternative; election.*—Where a contract is in the alternative, conferring on one party the right to become the purchaser of land by delivering annually a certain quantity of cotton, or to deliver a smaller quantity as rent and become a tenant, such party has his election to become purchaser or tenant within the time for paying the first annual installment; after which, on his failure to elect, the other party can treat him as either a purchaser or tenant; but an election once made by either party is irrevocable.

3. *Same; actual performance necessary.*—An election made either by the party himself or his personal representative depends on the actual performance of either one or the other of the alternative stipulations.

4. *Statutory lien for rent; arises from what relation.*—The lien the statute creates for the payment of rent arises only from the relation of landlord and tenant, and not from that of vendor and vendee.

5. *Same; relation created by election, refers back to contract.*—Whenever the election is manifested by a performance or non-performance of the stipulations, all the rights and incidents of the relation, as between the parties, and all persons who have, with notice, acquired rights which may be impaired, will attach from the time of making the contract.

6. *Same; where a third party had notice of such a contract, and knew it could be converted into a contract of renting at the election of either party thereto, whatever right or interest he might acquire in crops (cotton) grown on the premises would be subordinate to the landlord's lien for rent.*

APPEAL from the Circuit Court of Pike.

Tried before the Hon. H. D. CLAYTON.

This action was brought on the 1st of February, 1877, by Elizabeth Whigham against Nace Collins, to recover two

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hundred dollars for the alleged conversion by him of three bales of cotton, which cotton was grown on the premises of plaintiff, by her tenant, one Elisha Wilkes. The facts of the case are as follows: The plaintiff (appellee) agreed with said Wilkes to sell certain premises of plaintiff to Wilkes on condition that Wilkes pay her fifteen bales of cotton of 500 pounds each, deliverable in Clayton, Barbour county, in five annual installments, of three bales each, on the first day of November of each year—the first installment to be delivered in November, 1875; and if the said Wilkes should fail to deliver said cotton each year, it was agreed that he should pay two bales rent each year so long as he remained on the land. In pursuance of said agreements, the appellee executed her bond to make good the title in said land to Wilkes upon his making good the payment of said annual installments; and said Wilkes executed his several promissory notes in favor of appellee for the annual payment of said installments, with an endorsement as follows, upon each note: "If the face value of this note is not paid as purchase-money, then the said Wilkes is only to pay two five hundred weight bales of cotton as rent for certain lands." These notes and endorsements were dated December 13th, 1875—the date of the bond for title.

The evidence shows that said Wilkes failed to make good said installments, but in the year 1876, his son, under his directions, hauled two bales of cotton to Clayton with which to pay the rent; that after said agreements between appellee and Wilkes, and before the first note to pay the first installment was due, the defendant (appellant) received three bales of cotton from Mrs. Wilkes, the widow of said Wilkes, the latter having died since the agreement, on which defendant had a mortgage executed after said agreement. The bill of exceptions recites that "the proof showed that the defendant had notice of plaintiff's claim or lien on said cotton."

The above being all the evidence, the court, at the request of plaintiff, in writing, charged the jury that "if they believe the evidence, they must find for the plaintiff," to which defendant excepted. The giving of this charge and the rulings of the court admitting said bond, notes and endorsements as evidence, are now assigned as error.

W. D. WOOD, with whom was PARKS & HUBBARD, for appellant.—1. The rights of the parties depend upon the construction given the several instruments, which must be construed together.—2 Parsons on Contracts, § 15.

2. Until the election was made, there was no tenancy, and

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Collins having purchased the cotton before that election was made, he acquired a title which cannot be disturbed. It would be a violent construction to say that the non-payment of the purchase-money would take away Mrs. Whigham's rights as vendor. She could file her bill to enforce the vendor's lien, and that right continues until the contract is rescinded. Her lien depends as much upon this election as upon the non-payment of purchase money. This right of election is in the obligee to the bond for title.—2 Pars. on Contr. § 21; *Jackson v. Myers*, 3 John. 389; 16 John. 173.

3. The lien of landlord under our statute is made to depend on two things—a contract to pay rent, and the relation of landlord and tenant.—*Hadden v. Powell*, 17 Ala. 314; *Tucker v. Adams*, 52 Ala. 379.

JOHN D. GARDNER, *contra*.—1. There was nothing in the agreement between Mrs. Whigham and Wilkes inconsistent with the relation of landlord and tenant.—See 3d Head Note in *Seabury v. Stewart & Easton*, 22 Ala. 207.

2. The charge of the court was given in reference to the undisputed fact that the defendant had gotten possession of cotton which was covered by plaintiff's lien. The bill of exceptions states that "the *proof* showed that the defendant had notice of the plaintiff's claim or lien on said cotton."

BRICKELL, C. J.—1. The bond for title, the instruments by which Wilkes promised to deliver the three bales of cotton annually, as the consideration of the purchase of the lands, and the endorsements thereon were contemporaneously executed, relate to the same transaction, and must be construed together as if they were a single instrument.—*Sewall v. Henry*, 9 Ala. 24.

2. The contract which they import is in the alternative, conferring on Wilkes the right either to become the purchaser of the lands by delivering the number of bales of cotton specified annually as the consideration of the purchase, or, to deliver a smaller number as rent, and become a tenant. Whether he would become a purchaser or a tenant rested in his own election, until the time for the payment of the first annual installment. The principle is, that "in case an election be given of two several things, always he that is the first agent, and which ought to do the first act, shall have the election." If he failed to make the election at that time, then Mrs. Whigham could elect to treat him as a purchaser, bound to the delivery of the cotton specified as the consideration of the purchase, or as a tenant liable for the less quantity as rent. The election once made by either was,

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without the consent of the other, irrevocable.—Chitty on Con. 1061.

3. The evidence seems undisputed that in 1876, before the maturity of the first note or instrument, Wilkes directed his son to take two bales of cotton to the gin for the purpose of paying the rent, indicating that he intended to elect to assume the relation of tenant, and not that of purchaser. Mrs. Whigham was not informed of this intention, and the death of Wilkes prevented him from consummating it. After his death, there was no election by his personal representative, so far as is shown by the bill of exceptions. The election, whether made by Wilkes or his personal representative, depended on actual performance of one or the other of the alternative stipulations—either the payment of the quantity of cotton specified as the consideration of the purchase, or of the quantity specified as rent. There being no performance, Mrs. W., as she had the right, elected to treat it as a contract of renting, and not of purchase.

4. The lien the statute creates for the payment of rent, arises only from the relation of landlord and tenant, and not from that of vendor and vendee.—*Tucker v. Adams*, 52 Ala. 254; *Hadden v. Powell*, 17 Ala. 314. The existence of the relation, may rest in the election of the parties, and depend on the performance by the tenant of one or the other of the alternative stipulations in the contract into which he enters.

5. When the election is manifested, or there is performance, or non-performance of the alternative stipulations, creating the relation, the act must be referred to the time of making the contract, and the relation regarded as commencing and continuing from that time. All the rights and incidents of the relation, as between the parties, and all persons who have not, without notice, acquired rights which may be impaired, will attach from the time of making the contract. The landlord will become entitled to the lien for the payment of the rent, the statute creates, and may, for its enforcement, pursue the statutory remedy.

6. The appellant had notice of the contract between Wilkes and Mrs. Whigham, and having notice of it, knew that it could be converted into a contract of renting at the election of either. Whatever right to, or interest in the cotton grown on the premises he acquired, was subordinate to the lien of Mrs. Whigham.

The rulings of the Circuit Court were in accordance with these views, and the judgment is affirmed.

Purswell v. Brooks.

Bill in Equity to Enforce Vendor's Lien.

1. *Failure to assign errors; case affirmed.*—Where an appeal is taken to the Supreme Court, in a chancery case, the decree of the chancellor will be affirmed if there is no assignment of errors.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. N. S. GRAHAM.

The bill in this case was filed by Esau Brooks, appellee, against Gabriel Purswell. The averments of the bill are, that in the winter of 1867-8, said Brooks sold and conveyed to Purswell certain lands, executing his deed therefor, and turning over the possession to said Purswell. In payment of said land, said Purswell executed two promissory notes, upon which a number of payments have been made; that said conveyance was the sole consideration of the notes, of which the following are copies, showing the payments made:

"\$750. On or before the first day of January next, I promise to pay E. Brooks, or bearer, the sum of seven hundred and fifty dollars, for a certain piece of land known as the (here the land is described by metes and bounds), in Dale county, Alabama. This, third day of February, 1868.

G. PURSWELL."

"Received on the within note one hundred bushels of corn, @ \$1.00 per bushel, \$100.00; 25th October, 1869. 2,072 lbs. lint cotton, @ 25 cents per pound, \$518.50; 25th November, 1869. From the hands of Wm. Bateman, April 15, 1872, one hundred and sixty dollars. From Wm. Wise, on sixth of May, 1870, thirty-eight dollars."

"\$750. By the first of January next, I promise to pay E. Brooks, or bearer, the sum of seven hundred and fifty dollars, for a certain piece of land known as the (here the land is described). This, 18th day of November, 1867.

G. PURSWELL."

"Received on the within note one hundred dollars, part in corn and part in money, first January, 1868; one hundred dollars on third of February, 1868; fifty dollars first April, 1868; fifty dollars on 22d April, 1868; fifty dollars on 26th Feb. 1869; one hundred and seventy-eight and 22-100 dollars on 26th March, 1869; of J. K. Thompson, eleven and 50-100 dollars, 20th March, 1873."

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The bill prayed to have the notes declared a lien upon the land, and, if necessary, that the property be sold for the payment thereof.

The said Purswell filed his answer to the bill, admitting several of the allegations of the bill, and alleging certain additional payments on said notes, which are not credited, and denying that any more is due upon said notes; and also interposed the plea that "the said notes upon which this action is founded, are usurious and void for the interest due thereon."

The Chancellor rendered his decree granting the relief prayed in the bill. No assignment of errors seems to have been made.

MILLIGAN & BLACKMAN, for appellants.

CARMICHAEL & MAULDIN, *contra*.

STONE, J.—The present case must be affirmed for want of an assignment of errors.

We have looked through the record, and are satisfied the notes are not tainted with usury. The thirty bushels corn, and twenty dollars cash, are satisfactorily explained. As to the disallowance of an alleged additional payment, we are in doubt, even if it were presented by an assignment of error, whether the testimony convinces us that the register erred in its rejection. But, as we have said, there is no assignment of errors, and the decree of the chancellor must be affirmed on that ground.

Morris et al. v. Morris.

Bill in Equity for Final Settlement of Executor.

1. *Sale by, and purchase from executor; estoppel.*—An executor and purchaser from him are estopped, so far as they are personally concerned, from controverting the legality of their own sale and purchase.

2. *Same; what not necessary inquiry.*—Where a bill does not seek to set aside sales made by an executor, but, on the contrary, ratifies and confirms them, the court need not inquire whether such sales were or could have been made under powers contained in the will, or under orders of the Probate Court.

3. *Bill to recover legacy from executor; proper parties defendant.*—Where a bill seeks primarily and mainly to recover of an executor and his sureties, a legacy, the executor, his sureties, and the other legatees under the will, are necessary parties defendant.

4. *Money in circulation during the war; judicial knowledge.*—The court takes

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116	422
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judicial knowledge of the fact, that during the prevalence of the late civil war, neither gold, silver, nor United States money circulated in Alabama; but that during said war, until the downfall of the Confederacy in 1865, Confederate States treasury notes, and their convertible equivalents, composed the only circulating medium.

5. *Sale by personal representative for Confederate money; when no devastavit committed.*—Where a personal representative, in good faith, received Confederate money in the course of administration, he did not thereby commit a *devastavit*, or incur a greater liability than to account for the honest and faithful administration of the same.

6. *Multifariousness; what is not.*—Where a bill contains a feature in which there is no equity, all the averments in that connection will be treated as redundant, and they will not make the bill multifarious.

7. *Necessary proofs; failure to make.*—T. W. was entitled to one-eighth of testator's estate, but died leaving three children, of whom complainant is sole survivor, the other two children having died at the ages respectively of 14 and 12; bill was filed by the survivor, seeking to recover the entire one-eighth, which fell to him and the other two children, the averment being that the other two died leaving no debts: *Held*, 1. Such averment is very material to complainant's right to recover the interests of the two deceased children. 2. That without proof sustaining said averment, the complainant can only recover the one-third interest of the one-eighth which would have fallen to his father.

8. *Guardian ad litem; written acceptance of, not necessary*—In proceedings in the Probate Court, written acceptance of appointment as guardian *ad litem* is not necessary. It is enough if the record shows that he did accept and serve.

9. *Final settlement of executor and decree of Probate Court; failure of record to show.*—This court feels bound to hold, that the record in this case fails to show a valid final settlement and decree, so far as the present complainant and his brother and sister are concerned. As to their interests it names no person as plaintiff; hence the present proceeding must be treated as an application to recover the one-third of the one-eighth, as stated in 7th head-note, *supra*.

10. *Executor may retain money due him; when claim too small for chancery jurisdiction.*—Where the entire debt due an estate from the executor amounted to \$2,850, and his legacy and commissions were \$2,800, he was authorized to retain the amount due him out of the \$2,850, leaving him to account for the small residuum of \$50; and where the complainant is entitled to only 1-24 ($\frac{1}{24}$ of $\frac{1}{2}$) of such residuum, his claim is too small for chancery jurisdiction.

11. *Faithful administration by executor, of Confederate funds.*—Where an executor had in hand, in 1864, nearly one thousand dollars Confederate currency, in trust for complainant, who was a minor residing in Texas, where the executor could not reach him, and the will directed the executor to retain it, and there is no averment or proof that he could have invested it with profit, and it became valueless in his hands at the close of the war and before he could obtain access to complainant, and the identical money was deposited in the Probate Court by the executor, where it now remains, and he dealt the same way with his own funds,—such facts present a strong case of faithful administration.

APPEAL from Chancery Court of Perry.

Heard before the Hon. CHARLES TURNER.

The bill in this cause was filed on the 11th of February, 1873, by James B. Morris, appellee, against William G. Morris and others, appellants, to compel the settlement of the administration of said William G. Morris, as executor of the estate of one Thomas N. Morris, deceased, and to enforce, in favor of complainant as against defendant, John Chapman, a lien for the purchase-money of certain lands, purchased by

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him of the executor, and alleged to have been paid for in Confederate money.

There were several demurrers to the bill, which were overruled.

Upon final hearing, the Chancellor rendered his decree as follows: "The court is of opinion that the complainant is entitled to the relief prayed for in his bill. And, it appearing that, as against this complainant, there has been no valid final settlement of said estate, it is ordered that this court do, and it hereby does, assume jurisdiction of the final settlement of said estate, so far as the interest of the said complainant therein is concerned. And to this end it is ordered, adjudged and decreed, that it be referred to the register of this court to take and state an account between William G. Morris, the executor of said estate, and said estate, in which said account the said register will charge said executor with the value, in good money, on the 7th day of April, 1863, of the personal property of said estate by him on that day converted into Confederate currency, allowing him all just and proper credits. And the said register will also state an account of what is due from John H. Chapman for the purchase-money of the real estate mentioned and described in the bill."

The overruling of the demurrers, and the final decree of the Chancellor, are now assigned as error.

E. W. PETTUS, and W. B. MODAWELL, for appellants.—1. Appellant is entitled to credit for all the Confederate money he received, because he carried out the terms of the will and acted with prudence and good faith, and exercised diligence, and his acts were in no wise hostile to the national authority.—3d head-note in *Pitts v. Singleton*, 44 Ala. 363; *Bibb & Faulkner v. Avery*, Adm'r, 45 Ala. 691; *McLane v. Van Epps*, June term, 1875; *Horn v. Lockhart*, 17 Wallace, 570.

2. The laws now in force regulating the settlement of estates of decedents, and the descent and distribution of property, were in force at the time appellant settled his executorship, and Alabama was a State then, endowed with the "powers and faculties of administration" as she now is, and as she was before the war, and her citizens who discharged the duties of their fiduciary trusts during the war according to law, and received and disbursed the only currency then in circulation, should be protected by the courts, especially when the facts and circumstances of the case show, that they acted in good faith.—*Parks, Brewer et als. v. Coffey*, January term, 1875; *Whitley v. Alexander*, 73 N. C. 444; *Waring v.*

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Lewis et al., present term; *Blount et al. v. Moore, Adm'r, Ib.*; *Ferguson v. Long, Ib.*

3. The land as well as the personal property was sold under the will, and was sold for Confederate money; Chapman purchased and paid for it; Morris, the executor, made him a deed and he took possession by virtue of his purchase. There was no other currency in circulation at the time.

4. The executor was compelled to sell under the will, and the testimony shows that if he had made an effort to sell for any other than Confederate currency, he could have made no sale at all—he would have failed; and, under the will, he could not postpone the sale. The legatees were entitled to their legacies, and those who were of full age were present at the sale and ratified the conduct of the executor. Chapman ought not to be disturbed and ought to be permitted to enjoy the peaceable possession of the land, which in equity and good conscience he is entitled to.—*E. A. Blount et al. v. More, Adm'r*, present term.

JAMES E. WEBB, *contra*.—1. The record shows that no valid final settlement was made by said executor, and such is averred in the bill. And no guardian *ad litem* for complainant accepted service of appointment and consented, in writing, to act.—*Searcy v. Holmes*, 43 Ala. 608.

2. If the executor was acting in good faith to complainant, trying to preserve the fund for him, as the will directed, why was he in such hot haste to collect the proceeds of the land before it was due, and have himself, as he testifies, appointed guardian, &c.? If he was both executor and guardian, then the Probate Court had no jurisdiction to make the settlement.—47 Ala. 199; 44 Ala. 204; 41 Ala. 75; *Bruce v. Bryan*, January term, 1874.

3. The bill was filed by a legatee, to compel a final settlement and decree. Equity has jurisdiction.—1 Brick. Dig. p. 647, §§ 120, 121, 127; 36 Ala. 189.

4. Under section 9067 Rev. Code, (section 1743 of Code of 1852,) the jurisdiction of the Probate Courts to decree a sale of a testator's slaves and other personalty depended entirely upon the fact and allegation that the will gave no power. If the will did confer power of sale, then an order of sale made by the Probate Court is absolutely void.—*McCullum v. McCullum*, 43 Ala. 711; *Wilson's Adm'r v. Armstrong*, 42 Ala. 168; 35 Ala. 553.

5. These sales, made under and in pursuance of the orders of the court, can not be referred to the power of sale given by the will; and "said sale can derive no aid from the power thus conferred by the will."—*Ala. Con. M. E. Church, &c. v.*

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Price, Ex'or, 42 Ala. p. 39, o. p. p. 50; 33 Ala. 712; 4 Kent's Com. § 327. The sale of the slaves and other personalty was, then, a conversion by the executor.—See *Hall v. Chapman's Adm'rs*, 35 Ala. p. 559.

6. Some of the assignments of error present the question, whether the executor, who owed testator by inventory note, in good money, could discharge that liability in any other money. The administrator is chargeable with his own note. *Whillock, Adm'r, v. Whillock's Creditors*, 25 Ala. 543; *Whitworth v. Oliver*, 39 Ala. 293.

STONE, J.—The present bill does not seek to set aside any of the sales of the executor. On the contrary, it ratifies and confirms them, and claims relief solely on the ground that all the sales made were valid and binding. The executor and purchaser from him, can not be heard to controvert the legality of their own sales and purchases, because each is estopped, so far as they are personally concerned.—*Pistole v. Stret*, 5 Por. 64; *Hopper v. Steele*, 18 Ala. 828; *Lamkin v. Ruse*, 7 Ala. 170; *Elliott v. Branch Bank*, 20 Ala. 345; *McCausland v. Drake*, 3 Stew. 344.

Hence, we hold, that in this case we need not inquire whether the sales were or could have been made under the powers contained in the will, or under the orders of the Probate Court.—See *McRae v. McDonald*, 57 Ala. 423.

The present bill was filed by James B. Morris, grandson of Thomas A. Morris, and seeks primarily and mainly to recover of the executor of the latter's will—William G. Morris—and his sureties on his bond as executor, the legacy given by the will of said Thomas A. to Thomas W. Morris, father of complainant, now deceased. This feature of the bill makes, and very properly makes, the executor of the will, his sureties, and the other legatees under the will, parties defendant. The complainant seeks to recover \$2,550.61 from the executor and his sureties, being the sum found due the children of Thomas W. Morris, on the statement and allowance in the Probate Court of the executor's accounts, filed and made in March, 1864. This account current contained a statement of the entire assets of the estate, including the moneys collected from Chapman, after stated, and was filed for final settlement of the administration.

There is a second phase of the bill. It alleges a sale of the land by the executor, purchase by Chapman, payment of the purchase price in Confederate treasury notes, report by the executor to the Probate Court of the payment of the purchase-money, order by the court that the executor make title, and title actually made to Chapman, who is in posses-

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sion. The bill charges that the payment in Confederate money was illegal, and did not discharge the debt, makes Chapman a party defendant, and seeks to enforce a vendor's lien on the lands for the payment of the purchase-money promised by Chapman. There was a demurrer to the bill for multifariousness; the alleged multifariousness consisting in the joinder in one suit of the two matters stated above. The Chancellor overruled this demurrer.

We do not consider it necessary to decide this question, for the following, among other reasons: Thomas A. Morris, the testator, died in 1862, and his will took effect as of that date. By the first clause of his will, he bequeathed and devised that all his estate be sold to the highest bidder, and the proceeds be equally divided among his children, after the expenses and debts of his estate were settled up. This we judicially know was during the prevalence of the late civil war, when neither gold or silver, or United States money circulated or was to be obtained in Perry county, Alabama. We also know judicially that from that time to the downfall of the Confederacy in 1865, Confederate States treasury notes and their convertible equivalents were the only circulating medium we had. The authority to sell contained in the will, contemplated no postponement of the sale, and a majority of the legatees urged an immediate sale. Much the most valuable part of the property consisted of slaves. Under the circumstances, we think it was both the privilege and duty of the executor to sell; and he was justified in receiving in payment the only currency in the country, Confederate treasury notes.—See *Ferguson v. Lowery*, 54 Ala. 510; *McRae v. McDonald*, *supra*; *Cumming v. Bradley*, 57 Ala. 224. We do not mean to say that all the preceding circumstances were necessary to justify the executor in the collection of Confederate money, at the time it was received in this case. Our rulings are that when a personal representative, in good faith, received Confederate money in the course of administration, he did not thereby commit a *devastavit*, or incur a greater liability than to account for the honest and faithful administration of the same.

Under these rules there is no pretense of claim against Chapman for unpaid purchase-money, or against the executor for selling and converting the property into Confederate money; for there is neither averment or proof of any acts of fraud, bad faith, or collusion, against any party to this record. See *McRae v. McDonald*, *supra*; *Hutchinson v. Owen*, at the present term. There being, then, no equity in that feature of the bill which seeks to fasten a liability on Chapman, all the averments in that connection will be treated as redun-

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dant, and they do not make the bill multifarious.—*Carpenter v. Hall*, 18 Ala. 439.

Previous to the death of Thomas A. Morris, in 1862, Thos. W. Morris, his son, had died, leaving three infant children, of whom complainant is one. In 1868 the other two died, aged respectively 14 and 12. The present bill was filed by James Brainard Morris alone, and seeks to recover the entire one-eighth of the estate which fell to him and his brother and sister. Personal representatives of said two deceased children are not made parties to the suit, but the bill avers they died in infancy, leaving no debts. There is no proof, however, of this last averment, and it is denied in the answers. Children 12 and 14 years old, having no living father, can and generally do owe debts, if they have property. This averment is very material to complainant's right to recover the interests of his deceased brother and sister.—*Van Derveer v. Alston*, 16 Ala. 494, 499; *Miller v. Eastman*, 11 Ala. 609, 614. Under the pleadings and proof in this record, the complainant can recover, at most, only the one-third interest of the eighth which would have fallen to his father, about \$850.

It is contended for appellee that the executor's attempt to make a final settlement of his administration in March, 1864, was a failure, for two reasons: first, because the guardian *ad litem*, appointed to represent the minors on the settlement, did not accept the appointment in writing. In *Stahler v. Cook*, September, 1877, we decided that in proceedings in the Probate Court, written acceptance of appointment as guardian *ad litem* is not necessary. It is enough if the record shows, as it does in this case, that he did accept and serve. Second, it is contended that no final decree was rendered in this cause, and therefore the present bill will lie, to compel the executor to make final settlement. Without considering the question, *when* the final decree was written up, and the effect of delay therein, we feel bound to hold that the record fails to show a valid final settlement and decree, so far as the present complainant and his brother and sister are concerned. As to these interests it names no person as plaintiff.—*Rhodes v. Turner*, 21 Ala. 210; *Watts v. Watts*, 37 Ala. 543.

The present proceeding, then, must be treated as an application to recover the one-third interest of \$2,550 from the executor, as executor, and his sureties. We have shown above that the executor is not responsible for having converted the property into Confederate money. If he is responsible at all, it is for the \$850 found due complainant, and which was in Confederate money. It is contended, however, that he purchased two slaves, at the price of \$1,890, and that

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he should account for these. The entire purchases of the executor, and the debt due the estate from him, amounted to less than \$2,850. His legacy and his commissions amounted to \$2,800, leaving less than fifty dollars of this fund to be accounted for. The estate being settled as a solvent estate, he was authorized to retain this sum against his legacy and commissions, as far as the latter would go. Of the fifty dollars residuum, even if good money, the complainant was entitled to only one 24th part. Of a sum so trifling as this, the Chancery Court can not entertain jurisdiction.—1 Brick. Dig. 642, § 47.

In March, 1864, the executor, as executor, had in his hands \$850, Confederate currency, in trust for complainant. Complainant was a minor, in the State of Texas, and the executor could not reach him, if he had desired, or if it had been his duty to do so. It was his duty as executor to retain it, and the will had directed him to retain it. There is no averment or proof that he could have invested it with any profit. It perished in his hands by the failure of the revolution, before he could obtain access to the complainant. He, the executor, testifies—and he is uncontradicted—that he kept the identical money set apart for complainant and his brother and sister, until it became valueless in his hands; and that the identical money is now on file in the Probate Court of Perry county. This presents a strong case of faithful administration; and the record fails to show one act of faithless or negligent conduct against the executor. He did what the will commanded, what the legatees to whom he had access desired, and he dealt with his own interests precisely as he did with those of the other legatees.

If this proceeding were against Mr. Morris as guardian, (which it is not,) there is nothing in the record to fasten a liability on him in that character.—See *Davis v. Davis*, 10 Ala. 299; *Whitworth v. Oliver*, 39 Ala. 286, 294–5.

The decree of the Chancellor is reversed, and a decree here rendered, dismissing the bill in the court below at the cost of the complainant.

[Auerbach et al. v. Pritchett.]

Auerbach et al. v. Pritchett.*Bill in Equity to Enforce Vendor's Lien.*

1. *Promissory note; what is not; what contract not within § 2890 of Code.*—A cotton obligation, or promise to pay cotton "raised on land sold to the obligor, cultivated to the best of his skill and ability, as second payment on said tract of land, to be delivered to the payee," &c., is not a promissory note, nor one of the contracts enumerated in section 2890 of the Code of 1876, on which actions "must be prosecuted in the name of the party really interested, whether he has the legal title or not."

2. *Same; death of payee; when legal title will not pass by indorsement.*—Where the payee of such obligation dies, the legal title thereto vests in his personal representative; but between the time of his death and the appointment of his widow as administratrix, the legal title and the right to sue is in abeyance, and she cannot then transfer such title or right to sue by indorsing the obligation to a third party.

3. *Same; necessary parties to bill to enforce vendor's lien.*—Though such widow indorse such obligation before her appointment as administratrix, the legal title thereto vests in her when so appointed, and she and her indorsee become necessary parties complainant to a bill seeking to enforce a lien on land for which such obligation was given as part payment of the purchase.

4. *Bill of exchange; what is not.*—A bill of exchange is an order or letter requesting the payment of money; an order requesting the delivery of cotton is not such a bill.

5. *Same; oral acceptance, sufficiency of.*—Under section 2101 of the Code of 1876, an oral acceptance of a bill of exchange is not binding; but in the absence of such statute an oral acceptance would be sufficient. An order for the delivery of cotton not being a bill of exchange, such statute has no application, and hence an oral acceptance thereof is sufficient.

6. *Same; liability of maker to assignee; estoppel.*—If a promissory note, or other evidence of debt, is purchased on the faith of a promise by the maker to pay it, he will be compelled, at all events, to pay the assignee, and is estopped from asserting the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known at the time of such promise, or of a subsequent failure of consideration. And the same rule applies if the promisor had previously accepted an order to pay the debt, or any part of it, to another.

7. *Promise to pay obligation; burden of proof on assignee.*—Where A. makes a written obligation payable to B., and B. assigns the same as collateral to C., who relies upon the agreement of A. to pay to him such obligation, the onus of proving such agreement rests on C.

8. *Exemption; claim of by widow non-resident; subordinate to what.*—An administratrix of her deceased husband, who resided with him in Florida at the time of his death, can claim no exemption under the statutes of Alabama; and if she asserted such claim under the statutes of Florida, she should set it up in the bill and establish it by proof. But if this were done, it could not prevail over a valid transfer made by deceased in his life time.

APPEAL from the Chancery Court of Coffee.

Heard before the Hon. HURIOSCO AUSTILL.

This was a bill filed by appellants, Theo. H. Auerbach and Martha Clements, administratrix of one P. R. Clements, de-

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102	530
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103	127
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107	443
58	451
142	678

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ceased, against L. W. Pritchett, appellee. The bill avers that P. R. Clements, in his life time, sold and conveyed to said Pritchett certain lands in Coffee county, for which he took two obligations from said Pritchett, one of which has been discharged, the other being as follows: "By first of December, 1875, I promise to pay P. R. Clements, or bearer, the amount of cotton raised on fifty acres of land, more or less, raised on the lands sold by P. R. Clements to L. W. Pritchett, cultivated to the best of my skill and ability, as second payment on the said tract of land, the above described cotton to be gathered in due season, hauled to the gin by said Pritchett, the said P. R. Clements furnishing bagging and ties for enclosing said cotton.

L. W. PRITCHETT."

That the complainant, Martha Clements, is now the widow of said Clements, deceased; that on the 21st of May, 1875, and subsequent to her husband's death, she and P. F. Terry, one of the heirs of said estate, for provisions in meat, corn, flour, and other necessary supplies sold to her by Auerbach, the other complainant transferred said obligation to said Auerbach, by the following indorsement thereon:

"TROY, May 1st, 1875.

For value received, we hereby transfer to T. H. Auerbach all the right, title, and interest we have in and to the within note. Witness our hands and seals.

MARTHA CLEMENTS,
J. M. TERRY,
P. F. TERRY.

Test: J. B. MURPHEE,
JOHN C. BROWN."

That said estate is insolvent, and said note or obligation comprises the principal portion of the property of said deceased at the time of his death; that one thousand dollars worth of the cotton due on said obligation is exempt from the claims of creditors, heirs and distributees of said estate, to complainant Martha Clements, as said widow, under the constitution and laws of Alabama, and in such belief she indorsed and transferred said obligation to said Auerbach for the advancements made by him of said necessary provisions, to the full value of said cotton or note; that said provisions were for the benefit of minor heirs and herself; that said Martha Clements elects to claim said cotton or amount due on said note, or one thousand dollars thereof, as her exemption; and she again ratifies and confirms (by averment) the transfer of said note; that said note is all the property that

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has come into her hands as administratrix of said estate, except a horse and buggy worth seventy-five dollars; that said note is now the property of complainant Auerbach; that before the consummation of the "trade" as between the complainants, in regard to said note, "said Auerbach sent his agent, one John C. Brown, to inquire of the said Pritchett relative to said note or obligation, and asked him if he had any defense or offsets against said note; and he told the said Brown that he had none, that the note was all right, and that if the said Auerbach traded for said note or obligation he would deliver the cotton to him; that said Auerbach, upon the faith of said representations, was induced to trade for said note and to pay the full value therefor."

The bill prays that the chancellor, upon a final hearing, may decree a reference to the register to state an account ascertaining the amount of cotton raised by said Pritchett on the fifty acres, for the year 1875, and the value of said cotton on the 1st of December, 1875, and declare said amount to be a lien upon the land purchased; and for a sale of the same to pay said amount, and for general relief.

The answer of L. W. Pritchett, which admits many of the averments of the bill, alleges and denies as follows: That the said P. R. Clements did, on the 12th of December, 1873, sell and transfer to one N. Collins & Co., in writing, two hundred and seventy-one and 22-100 dollars worth of said cotton, and gave them an order, in writing, to respondent, instructing him to deliver to said N. Collins & Co. enough of said cotton to bring said amount; which order respondent accepted, and agreed to deliver said cotton at the special instance and request of said Clements, long before his death; that in accordance with said order, &c., respondent delivered to said N. Collins & Co. all the cotton raised on said fifty acres of land during the year 1875, which was only twenty-two hundred and fifty-two pounds of lint cotton, not exceeding in value two hundred and seventy-two dollars; that respondent has paid all of his purchase-money for said lands as agreed on by said Clements in his life time, and in strict compliance with the terms of his transfer and sale to N. Collins & Co.; that said cotton was the property of N. Collins & Co., and that said Martha Clements and P. F. Terry had no right to transfer said instrument to said Auerbach; that the said Clements had parted with all of his interest in said note or obligation long before his death; that said note was not exempt from the claims of creditors, &c.; that at the time of the death of said Clements, he and his family were residents and citizens of Jackson county, Florida, and that said note formed no part of his estate; that said Mar-

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tha Clements had no right to claim the exemption as alleged in the bill; that said note, &c., formed not part of the estate or assets of deceased, at the time of his death; that said note is not the property of complainant Auerbach; that respondent never told said agent, John C. Brown, what is alleged in the bill, but that he told said Brown that the said P. R. Clements had sold and transferred said cotton to said Collins & Co., by the order, &c., as heretofore alleged in this answer. After answering the bill, the respondent sets out and asks that the matter in relation to the transfer to N. Collins & Co. be taken by way of plea. In addition, and as part of the answer, the following grounds of demurrer were interposed: 1st. Misjoinder of parties complainant; 2d. The bill shows no interest in Martha Clements; 3d. The bill fails to aver that Martha Clements, as administratrix, has any interest in or right to prosecute this suit; 4th. Failure to aver that Martha Clements was ever duly appointed administratrix; 5th. There is no averment of facts showing that Martha Clements is such administratrix; 6th. The bill shows that complainant, Auerbach, has no such interest in this suit as will authorize him to sustain this action; 7th. Want of equity in the bill—the facts, as stated, not authorizing the complainant, or either of them, to sustain this action.

Upon final hearing, the cause being submitted on pleadings and proofs, the chancellor decreed that, "under the averments of the bill, the complainant Auerbach is the only complainant who has any interest in the note sued on. Considering the well settled equity rule that, when two or more join as complainants in a bill, they must all have an interest in the subject matter of the suit and be entitled to some relief, the court is constrained to hold that the 1st, 2d, and 3d demurrers, which raise the question of misjoinder of parties complainant, are well taken, and are sustained." Whereupon the bill was dismissed.

The decree is now assigned as error.

W. D. Wood, for appellants. —1. Assignee and assignor were properly joined as parties complainant, to enforce the lien of the instrument assigned.—1 Danl. Ch. Prac. 251; *Corbin v. Emerson*, 10 Leigh. 663; *Smith v. Huley*, 8 Mo. 559, 560; 1 Storp Eq. Pl. § 153; Calvert on Parties, 239, 248; Edmonson on Parties, 79-82; *Plowman v. Biddle et al.*, 19 Ala. 180; *Anderson v. Ryan*, 3 Madd. Ch. R. 174; *Blevins, Adm'r v. Buck*, 26 Ala. 292; 9 Port. 697; 2 Ala. 572; 7 Ib. 386; 10 Ib. 283.

2. The rule in equity is well defined to be that, where the
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extent and validity of the transfer is not questioned, then it would not be error to proceed in the name of the assignee alone. Yet, it would not be error to join the assignor as a party complainant.—19 Ala. 180; 10 Ala. 283.

W. D. ROBERTS, *contra*.—1. There is a misjoinder of the parties plaintiff in the bill. If Auerbach is entitled to recover, the complainant, Martha Clements, is not, neither is she as administratrix of the estate of P. R. Clements, deceased. If they are not all entitled to relief, then neither can recover.—*Wilkins & Wilkins v. Judge & Dunklin*, 14 Ala. 135; *Moore et al. v. Moore et al.*, 17 Ala. 631; *Tucker v. Holley*, 20 Ala. 426; *Plant & Co. v. Voeglein & Vasser*, 30 Ala. 160; *Vaughan & Wife v. Lovejoy*, 34 Ala.; *Moore et al. v. Armstrong et al.*, 9 P. 697.

2. Whenever the defect of a misjoinder appears upon the face of the bill, it is subject to a demurrer.—*Whitaker v. De Graffenreid*, 6 Ala. 303; *Moore v. Armstrong*, 9 P. 697; *Colburn v. Broughton*, 9 Ala. 351; *Tucker v. Holly*, 20 Ala. 426; *Vaughan & Wife v. Lovejoy*, 34 Ala. 437.

3. The exemptions allowed by law are intended for the benefit of citizens of this State.—*Allen v. Monopee & Wisely*, 4 Ala. 554; *Boykin v. Edwards*, 21 Ala. 261. All the rights that Mrs. Clements took at the death of her husband, as his widow, are governed by the laws of Florida, as to his personal property.—*Johnson v. Copeland's Adm'r*, 35 Ala. 521.

4. Auerbach took no title or interest in the property by a private sale, even if made by the administratrix.—*Fambro v. Gantt*, 12 Ala. 298.

5. A sale made by a party in possession of the property, after the death of the intestate, and before administration granted, passed no title to the purchaser.—*Carpenter v. Grigg, Adm'r*, 20 Ala. 587.

6. The title to the cotton passed to N. Collins & Co. on the transfer to them by P. R. Clements, deceased, and the payment to them by the defendant Pritchett, was proper, and the plaintiffs in this suit are not entitled to recover on the merits. As to the motion to set down the demurrer to be heard separately, see 69th rule, Chancery Practice, R. C. page 833.

STONE, J.—The 'cotton obligation,' or promise to pay cotton, is not a promissory note, and is not one of the contracts enumerated in section 2890 of the Code of 1876, on which actions "must be prosecuted in the name of the party really interested, whether he has the legal title or not." This

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is not a contract for the payment of money, but an obligation to cultivate land in cotton, and deliver the product to the payee, Clements. The legal title to the paper, and the right to sue upon it, passed to, and vested in Mrs. Clements, when she was appointed administratrix of her deceased husband. Between the death of Mr. Clements and her appointment, the legal title and right to sue were in abeyance. Her indorsement of the paper to Auerbach, made as it was before her appointment as administratrix, did not pass the legal title to him. She did not hold the legal title then, and could not transfer that which she did not own. Hence, when this bill was filed, the legal title was in her, in her representative capacity. It results that to any suit instituted for the enforcement of the contract, or any lien growing out of it, she was a necessary party; and Auerbach, if entitled to the recovery, or a part of it, was also a proper party, that his interests might be protected.—See statement of facts in the case of *Watts v. Gayle*, 20 Ala. 817. This is not the case of a suit by several complainants, some of whom have no right of recovery. The recovery in this case, if one be had, is one and indivisible. It is the assertion of a lien, legally held by Mrs. Clements as administratrix, in the fruits of which Auerbach claims an interest. There is no misjoinder of parties complainant, and the decree of the chancellor, sustaining the demurrer on that ground, was an error.—See, as to assignability of the obligation, *Skinner v. Bedell*, 32 Ala. 44; *Henley v. Bush*, 3 Ala. 636.

The order given by Clements, intestate, in favor of N. Collins & Co., is anterior in date to the claim of purchase by Auerbach. It is an order on Pritchett, the maker of the cotton obligation, to deliver to N. Collins & Co. enough cotton to pay a note they held against Clements for two hundred and seventy-one 22-100 dollars, "which will be credited on the note I hold against Mr. L. W. Pritchett." This order was never accepted in writing. The testimony of Collins and Pritchett proves that before Auerbach's claim accrued, this order was shown to Pritchett; that he stated he had found mortgages and incumbrances on the land he had bought, of which he had no notice at the time of his purchase, which he had paid, or would be required to pay, to save his land. That, after being allowed for such payments, if no other mortgages were produced, he would then deliver the cotton to them, in obedience to said order. This promise was made orally. No other mortgages were produced, and Pritchett, in December, 1875, delivered to Collins & Co. all the cotton produced on said fifty acres of land during that year, which

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fell short of paying up said order. The question arises, was this verbal acceptance sufficient?

Section 2101 of the Code of 1876, declares that "no person within this State must be charged as the acceptor of a bill of exchange, unless his acceptance is in writing, signed by himself or agent."—See *Sands v. Matthews*, 27 Ala. 399. But the contract, which is the foundation of the present suit, is not a bill of exchange. A bill of exchange is an order or letter, requesting the payment of money. The present contract is an order, requesting the delivery of cotton. The statute has nothing to do with this case.

In the absence of the statute copied above, an oral acceptance of a bill of exchange would be legal and binding.—See Leading Cases on Bills of Exch. 42, *et seq.*; Story on Bills, § 242; 1 Pars. on Notes and Bills, 385, and notes; Edwards on Bills and Notes, 409. And no other mortgage on said land having come to light, the conditional acceptance or promise made by Pritchett became absolute, upon which an action at law might have been maintained by Collins & Co. This, then, rendered Pritchett liable to pay them, before the claim was attempted to be transferred to Auerbach.

But the fact that Pritchett, by accepting Clements' order, has bound himself to deliver the cotton to Collins & Co., is not necessarily a defense to the claim asserted by Auerbach. It is possible for him to bind himself to pay to each. If a promissory note (or other evidence of debt), is purchased on the faith of a promise by the maker to pay it, he will be compelled at all events to pay the assignee, and is estopped from asserting the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known at the time of such promise, or of a subsequent failure of consideration. And the same rule would apply, and for the same reason, if the promisor had previously accepted an order to pay the debt, or any part of it, to another.—See 1 Brick. Dig. 271, § 287. See, also, *David v. Shapard*, 40 Ala. 587; *Traun v. Keifer*, 31 Ala. 136; *Lowry v. Stewart*, 8 Ala. 163.

The testimony in this record shows that Auerbach credited Mrs. Clements one hundred dollars, on the faith of the cotton obligation as collateral security, before he or his agent had any interview with Pritchett in regard to it. In reference to this one hundred dollars, there is no pretence that Pritchett has done anything to estop him from making defense. As to the terms of the interview afterwards had between Brown, the agent of Auerbach, and Pritchett—on the faith of which it is alleged for appellant that he purchased the obligation—Brown and Pritchett, the only per-

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sons present, are in direct conflict. Brown derives some confirmation from the testimony of Auerbach, proving an interview, afterwards had between him and Pritchett; and Pritchett was, perhaps, equally confirmed by the testimony of the witnesses, Eagerton and Brall. The onus of proving Pritchett's agreement to pay the obligation to Auerbach, rested on the latter, and we do not think the testimony preponderates sufficiently in his favor to justify us in finding it as one of the proven facts in this cause. The result is, the complainant must fail on the merits of his case.

Mr. and Mrs. Clements, being residents of the State of Florida at the time the former died, Mrs. Clements can claim no exemptions under the statutes of Alabama; and if she asserted any such claim under the statutes of Florida, it was necessary to set it up in the bill, and establish it by proof. But, if this were done, it could not prevail over the transfer of the cotton to Collins & Co., made by Clements in his life time.

Decree of the chancellor affirmed.

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Action on Detinue Bond.

1. *Breach of detinue bond; what fees of counsel not recoverable.*—Fees of counsel employed to prosecute an action for breach of condition of bond given by plaintiff in detinue, are not recoverable as part of the damages the defendant may have sustained from the wrongful suit.

2. *Resisting new trial; when counsel fees recoverable.*—An application for a new trial in the original suit is a mere continuation of such suit—necessarily incident thereto—and counsel fees for resisting such application are, therefore, recoverable.

3. *Statute requiring non-suit; extent of. Term "moneyed demand"; embraces what.*—The statute (R. C. § 2678) requiring a non-suit against the plaintiff recovering less than fifty dollars unless he makes the prescribed affidavit, extends to every suit on a "moneyed demand"—which term embraces every demand arising out of contracts, express or implied, which, from their nature, enable the plaintiff to make affidavit that the amount sued for is actually due.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. JOHN K. HENRY.

This was an action brought by appellant, J. L. Mills, against appellees, John F. Long and his sureties, on a detinue bond executed by appellees in a suit in detinue brought by said Long against appellant. The trial of the detinue suit was had at a previous term of said Circuit Court, which

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resulted in a verdict for the defendant (Mills) in that suit. The plaintiff in said suit applied, within four months, for a new trial, upon the ground of "fraud, accident or mistake," which application was refused by the circuit judge. On the trial of this cause the plaintiff (appellee) introduced the record of the detinue suit, and also the record of the application for a new trial; and there was no objection by defendants. The plaintiff in this suit then undertook to prove the damages he sustained on said application for a new trial, but the court refused to allow such proof and an exception was reserved. The plaintiff was allowed to amend his complaint by adding: "the plaintiff claims by way of special damages twenty dollars as counsel fees for bringing this suit," and to the complaint so amended the court sustained a demurrer. The defendants moved to set aside the judgment on the ground that "the suit was a "moneyed demand," and the judgment and verdict were for twenty dollars—an amount less than the jurisdiction of the court and there was no set off," which motion was granted. The various rulings of the court are now assigned as error.

JOHN D. GARDNER, for appellants.—1. The demurrer to amended complaint should not have been sustained.—See *Burton v. Smith*, 49 Ala. 293.

2. Is a detinue bond a *moneyed demand*? Is it not for the performance of some act or duty? On this point I cite *Phillips v. Sellars*, 42 Ala. 660; *Skinner v. Bedell's Adm'r*, 32 Ala. 44; *King v. Palmer*, 34 Ala. 416.

GAMBLE & BOLLING, *contra*.—The demurrer to the amended complaint was properly sustained; also the objection to evidence of damages by the new trial.—See *Müller v. Gould*, 35 Ala. 96; *Ferguson et al. v. Barber's Adm'r*, 24 Ala. 402.

BRICKELL, C. J.—The demurrer to the amended complaint, is founded on the single ground that fees of counsel employed to prosecute an action for a breach of the condition of the bond given by the plaintiff in an action of detinue are not recoverable as part of the damages the defendant may have sustained from the wrongful suit. The condition of the bond is, that if the plaintiff fail in the suit, he will pay the defendant all such costs and damages as he may sustain by the wrongful complaint. Counsel fees, and other costs incurred in defense of the action of detinue, it has been held, are recoverable of the obligors in the bond. Beyond this it has been decided their liability does not extend.—*Ferguson v. Barber*, 24 Ala. 402. The costs and counsel fees of collat-

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eral proceedings which may or may not grow out of the action, have not been supposed to fall within the condition. Certainly not the costs of a new and independent suit. It is on this ground that it was held in *Ferguson v. Barber, supra*, that counsel fees incurred on an appeal to this court were not recoverable in an action on the bond. There was no error in sustaining the demurrer.

2. The court was in error in instructing the jury that the counsel fees for resisting the application for a new trial were not recoverable. It was a mere continuation of the original suit, a proceeding to which it was necessarily incident, and the costs of it are costs sustained by the wrongful complaint.

3. The statute which requires a non-suit to be entered against a plaintiff recovering less than fifty dollars, unless he makes the prescribed affidavit, extends to every suit on a *moneyed demand*.—R. C. § 2678. This term has been held to embrace all demands arising out of contracts, express or implied, which, from their nature, enable the plaintiff to make affidavit that the amount sued for is actually due.—*King v. Palmer*, 34 Ala. 416. Within the term, the present demand falls.

For the error pointed out the judgment must be reversed and the cause remanded.

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Bill in Equity to Condemn Lands for Satisfaction of Mortgage Debt.

Error without injury; what not cause for reversal.—Where mortgagors and their lands are bound in any event for the payment of debts to different persons, it is no injury to them to give priority to either debt; hence they can not complain of a decree condemning lands for satisfaction of a mortgage, on the ground that it erroneously gave one debt a preference over the other—although the case would, perhaps, be reversible, if a party *actually aggrieved* had complained.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. B. B. McCRAW.

William C. Oates, the appellee, filed his bill against John M. Bethune, James A. Flemming, W. H. Stuckey, Elizabeth John as guardian, and others. The bill avers that in 1872, one Henry Maybin sold certain lands described in the bill to said Bethune; that on the 21st of December of that year

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Bethune sold one-half of said land to said Flemming, and by agreement of said three parties, the said Bethune and Flemming delivered to said Maybin, in part payment of said lands, their two notes, as joint purchasers, and that other notes were given by said Bethune and Flemming for said purchase; that some time after the giving of said notes, Maybin transferred one of them to said Oates, and the other to said Stuckey, which also was afterwards transferred to said Oates, the lien on said notes being still retained in Oates' hands; that the said Maybin subsequently sold the other notes, to whom the complainant Oates does not know; that said Bethune and Flemming afterwards executed a mortgage on the whole of said land to said Mrs. Elizabeth John, as guardian of her children, for the payment of a note to her dated the same day as notes held by complainant, "but in fact," the allegation is, "said mortgage and the note it was made to secure, were executed and delivered to said Elizabeth Johns after the said notes held by complainant, and with her full knowledge, and notice to her, before she took said mortgage; that said Bethune and Flemming had not paid for said land." It is further averred that said mortgage to Mrs. John was to secure a pre-existing debt, and that said Mrs. John is not an innocent purchaser without notice; that after giving said mortgage the said Bethune executed a deed of half of said land to the wife of said Stuckey and Bethune's mother-in-law; that said deed was upon a false consideration, and was made to defraud and delay the complainant, Oates, and other creditors of Bethune; that at the time complainant purchased said notes he had no knowledge of the mortgage held by Mrs. John as above alluded to. The bill then concludes with a prayer for a reference to ascertain the amount due complainant on said notes, and to decree a lien upon the lands for the payment thereof, and to sell said land for such purpose. Instead of answering the bill, the following agreement was made: "It is hereby agreed between the complainant and defendants, that the defendants make no defense, but that at the next term of the Chancery Court the complainant may take a decree for the sum of \$1,475, with a lien declared on the land for its payment, but not to be enforced nor to bear interest until the first day of January, 1875, and if not paid then, said land to be sold for the payment of said decree to be rendered against John M. Bethune and James A. Flemming. Said Elizabeth John, as guardian, &c., is not to foreclose her mortgage, nor to take any action to that end until said first day of January, 1875;" dated January 15th, 1874, and signed by all the parties.

In April, 1874, the Chancellor, upon the bill and above

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agreement, decreed that the complainant was entitled to relief, and ordered that said Bethune and Flemming pay to complainant said sum, on or before the first day of January, 1875, in accordance with the agreement, and that complainant have a lien on the land, and if said sum be not paid as aforesaid, that said land be sold, &c., to satisfy the decree, and that the mortgage debt in favor of defendant, Elizabeth John, guardian, &c., be postponed in favor of the lien of complainant, in accordance with said agreement. From this decree the defendants, Bethune, Flemming and Stuckey, have appealed to this court, (Mrs. John not appealing,) and assign as error, among other things, the following :

1. Said decree violates the agreement of the parties in ordering and decreeing that the mortgage debt of defendant, Elizabeth John, guardian, &c., be postponed in favor of the lien of complainant.

2. Because said decree is not in accordance with said agreement.

3. Because said Elizabeth John had no authority to enter into said agreement or to consent to said decree.

J. L. PUGH, for appellants.

WM. C. OATES, *contra*.

No briefs came to Reporter.

BRICKELL, C. J.—The decree may, so far as it entitles the appellee to priority of payment, over the mortgage to Mrs. John, depart from the agreement of the parties, and if she was complaining the error would perhaps compel a reversal. But she did not join in the appeal, nor in the assignment of errors. The mortgagors are the only parties appellant, and they are bound for the payment of the debt to the appellee, and the mortgage debt to Mrs. John, and have no interest in the matter of priority of right to charge the lands. In any event, as to them, the lands are subject to the payment of both debts, and they are not injured, and can not be, by according priority to either debt. A party is not allowed to obtain a reversal because of errors not injurious to him. The decree is affirmed as to the appellants.

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Drew v. Simmons.*Action on Account.*

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1. *Competency of witness ; to what beneficiary can not testify.*—Under section 3058 of the Code of 1876, which enlarges the exception contained in section 2704 of the Revised Code, a beneficiary in the suit, though not a party to the record, can not testify in his own interest, to any transaction with or statement by a deceased person, whose estate would be affected prejudicially by the evidence.

2. *Name ; what interest incapacitates.*—A person contracting with the decedent is not a competent witness, to prove the contract, in his own behalf, in a suit against the personal representative; and it would be against the policy of the statute, and might lead to great abuse to hold that his competency was restored by the transfer of the claim to another.

APPEAL from the Circuit Court of Monroe.

The record of this case never having come to the hands of Reporter, the same is, unavoidably, reported without the name of the judge before whom the trial was had, and without a statement of the facts. To aid, therefore, in an understanding of the case, the counsels' briefs, found on file, are printed in full.

S. G. CUMMING, for appellant.—1. The questions of law in this case arise under section 2704 of the Revised Code, as amended by the act of March 2, 1875, (Acts 1874-5, p. 252.) The account sued on was made by the deceased, John Peebles, with the witness, John A. Simmons, as is alleged in the complaint. The witness, Simmons, as appears from the bill of exceptions, was the transferor of the account sued on. Being transferor, the case comes within the rule laid down in *Lewis, Adm'r, v. Easton*, 50 Ala. 470, "as to any transaction with or statement by" the deceased.—*Allison, Adm'r, v. Tally, Adm'r*, December term, 1877.

2. The account sued on was an account against the deceased, John Peebles, in favor of the witness, John A. Simmons, as appears from the account itself, which is set out in the record. Were the matters, as to which the witness, John A. Simmons, was permitted to testify, within the exceptions contained in the statute? The matters were these: 1st. As to when the deceased came to witness' house to board; 2d. When deceased left the house of witness; 3d. As to whether or not the account sued on had been paid. I insist that the first two questions are clearly within the

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exceptions in the statute. The deceased going to the house to board and his leaving there, were "transactions with the witness," within the meaning and spirit of the exceptions contained in the statute. This statute, section 2704 of the Revised Code, was a very great and wide invasion of the common law, and is to be strictly construed. The third question, "has the account ever been paid?" necessarily involved within it another question, viz: As to whether or not said account had ever been paid by any one, and that included the deceased? The question then was, in effect, whether or not the account had ever been paid by the deceased? The question then involves a transaction, or transactions, with the deceased, namely, the transaction of payment. Being thus really within the exception, the question should not have been asked the witness.—*Stuckey v. Bellah*, 41 Ala. 700; *Kirksey v. Kirksey*, 41 Ala. 627; *Lewis' Adm'r. v. Easton*, 50 Ala. 470; *Allison, Adm'r v. Tally*, December term, 1877. As each of the questions were illegal, each of the answers should have been excluded. The witness was incompetent at common law on the ground of public policy, and this incompetency was not removed by the statute.—*Clifton v. Sharpe*, 15 Ala. 618.

3. I insist that the decisions of this court, as they appear in the following cases, show that the court below erred in permitting the questions to be asked, and in permitting the answers going to the jury.—*Houston v. Prewett*, 8 Ala. 846; *Clifton v. Sharpe*, 15 Ala. 618; *Waldman v. Crommelin's Adm'r*, 46 Ala. 580; *Mayor, &c. v. Jones*, 42 Ala. 630; *Key v. Jones' Adm'r*, 52 Ala. 238, and cases before cited. This question is discussed in Wharton on Evidence, and the law held to be in my favor as I understand it.

C. J. TORREY, *contra*.—1. The witness, Simmons, was competent to testify as to any matter pertinent to the issue and not within the exception contained in the statute (section 3058 new Code).—*O'Neal v. Reynolds*, 42 Ala. 197; *Avery's Ex'rs v. Avery*, 49 Ala. 193; *Goldsbee's Adm'r v. Fordham*, 49 Ala. 202; *Bragg v. Clark*, 50 Ala. 363; *Miller v. Clay*, Head Notes, December term, 1876.

2. The objection to the question, "state when Peebles came to your house," and to the answer of the witness, were properly overruled. The witness, Parker, had just testified that decedent (Peebles) went to Simmons' house sometime in 1870, and left in October 1872, and the question to Simmons simply called for a date, not for any transaction with, or statement made by decedent. It was proven by another witness that deceased did go to the house of Sim-

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mons sometime in 1870, and that he left in 1872, about October, and the statement by Simmons of the particular times in 1870 and 1872 that decedent came and left, can not be tortured into testimony of a transaction with the deceased. He did not say a word about any transaction; he did not testify that there was *any* contract for board, or about any contract at all—nor did he even say that deceased *boarded* with him—he simply gave a date, leaving it for the testimony of others to show those facts necessary to entitle the plaintiff to a judgment.—*Miller v. Clay, supra*, (Head Notes), December term, 1876.

3. And even if the court erred in this respect, so far as it appears from the bill of exceptions, it was error without injury. The bill does not purport to set out all the testimony, and every presumption is against the party appealing, and we submit that the court committed no error in overruling the objection.

4. The same argument applies to the objection to the other question to Simmons, viz: "State when he (deceased) went away?"

5. It is stated that, when a statute declares a general rule with an exception, the *exception* is to be more strictly construed than the statute itself.—*Bragg v. Clark*, 50 Ala., last part of p. 365. And the exception should not be stretched to cover cases not clearly within the prohibition.

6. The question, "Has that account been paid, *so far as you know?*" and the answer thereto, were properly admitted. The question and answer evidently had reference to any payments that might have been made by the administrator or other person, after the death of Peebles, and not to any transaction with or statement of deceased. The bill of exceptions and form of the question show this—besides, the answer destroys the idea of a transaction, and shows there was none for him to testify about, if it had reference to deceased. We submit that there is no error in the record.

STONE, J.—In *Allison v. Tully*, at the present term, we noticed the differences between section 2704 of the Revised Code, and section 3058 of the Code of 1876, and pointed out wherein the present statute enlarges the exception contained in the former one. We also quoted with approbation the decision in the case of *Key v. Jones*, 52 Ala. 238, in which it was said, "when the purpose of evidence is to diminish the rights of a decedent, or of those claiming in succession to him, by declarations or admissions made by him, or transactions had with him, in his life, no party in interest is a competent witness to prove such admissions, declarations, or

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transactions." So, in that case, and in the later case of *Allison v. Tally*, *supra*, we gave to the statute a construction, broader than its mere words; and held that a beneficiary in the suit, though not a party to the record, could not testify in his own interest, to any transaction with, or statement by a deceased person, whose estate would be affected prejudicially by the evidence. We further held, in the later case, that the policy of the exception was, to exclude the testimony of a living, interested witness, against a deceased person's estate, because no one should be heard to testify of a transaction with, or statement by another, who had, in the meantime died, and hence could not confront, and, perchance, contradict the evidence thus given against him or his estate.

In the present case, the witness was the person with whom the alleged contract was made. If he had sued, it is clear that he was incompetent to testify in his own favor as to any transaction with, or statement by defendant's intestate. To hold that a creditor thus circumstanced can, by a transfer of the claim to another, render himself competent to give evidence which he could not give in his own favor, would be a palpable perversion of the policy of the statute, and might lead to a most shocking abuse.

The testimony given, and objected to, would, if believed, have established a *prima facie* case for recovery of the value of intestate's board, sued for. And it is too clear for dispute, that the facts proved by each of them, related to a transaction with defendant's intestate. They raised an implied assumpsit or promise by Peebles, the deceased, to pay a *quantum meruit* therefor. The Circuit Court erred in admitting this evidence.

Reversed and remanded.

[Smith v. Fellows, Adm'r.]

Smith v. Fellows, Adm'r.

Action against Administrator for Money had and received by Intestate.

1. *Statute barring claims against estate of decedent; purpose of sections 2597 and 2598, Code of 1876.*—The provisions of sections 2597 and 2598 of the Code of 1876, limiting the time within which claims against decedents' estates will be barred, have been of force since 1815, and have been frequently construed. The purpose of the statute was to promote a speedy, safe, and definitive settlement of estates, by giving the personal representative notice and knowledge of all claims against the estate in his hands. These, and other patent results of the statute, go to make up a policy to which it is the duty of courts to give full effect.

2. *Same; what sufficient presentation of claim.*—To constitute a sufficient presentation of a claim, under the statute, the nature and amount of the claim must be brought to the attention of the personal representative by some one authorized to make the presentation, and the representative must be notified expressly or impliedly that the estate is looked to for payment. Less than this does not meet the purpose of the statute.

3. *Same; when the claim is an open account or legal liability,* it should be reduced to writing, and be so presented. Less than this would not be sufficient information for the representative to base action upon. (*Affirming Bigger v. Hutchings*, 2 Stew. 445.)

4. *Same; provision of § 2599; what inquiry not unreasonable.*—Under section 2599 of the Code of 1876, "the presentation may be made either to the executor or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate, in which letters were granted." And to file such claim in the probate office, it must, unless a written contract, be reduced to writing. The requisites of a valid presentation, and the object to be attained, being manifestly the same in each of these optional methods, it becomes not unreasonable to inquire whether they would be sufficient, if filed in the office of the judge of probate and entered on his docket, when given facts and circumstances are relied on as proof of personal representation.

5. *Charge given; what not error; when explanatory charge allowable.*—Where a charge asserts a general principle correctly, but is objected to because of its tendency to mislead, owing to the facts of a particular case, it is the privilege of the party objecting to ask an explanatory charge. A charge given, which is objectionable alone because of its tendency to mislead, is no ground for reversal.

6. *Action for money had and received; when will lie; recovery under.*—An action for money had and received by an intestate in his life time, as trustee, will lie against his administrator, if there are no unsettled matters of account growing out of the trust; and it is no obstacle to this form of action that the amount claimed is greater than that proved to be due.

7. *Amendment of complaint; when properly disallowed.*—When an amended complaint fails to present a cause of action not fully covered by the original complaint, the refusal of the court to allow the amendment cannot work injustice, and hence is not error.

APPEAL from the City Court of Selma.

Tried before the HON. JONATHAN HARALSON.

This action was brought at the fall term, 1875, of the Cir-

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cuit Court of Dallas county, and on the 9th of June, 1876, was, by written consent of all parties, transferred to the City Court of Selma, where trial was had. The action was against Wm. H. Fellows, as administrator of the estate of one Dent Lamar, deceased, "for three thousand dollars, due from the said intestate's estate, to the plaintiff (Mary E. Smith), by account on the — day of July, 1856, for so much money by the said Dent Lamar, then living and since deceased, had and received, to and for the use of the plaintiff." The following are the facts of the case.

One O. C. G. Moss lived in this State—owned personal property in Louisiana—died in Dallas county, Alabama, in 1855. His heirs were his brothers and sisters, to-wit: Mrs. James Norris, Sterling Moss, James Moss, Henry Moss, Mary DuBose, and Mrs. M. G. Lamar, wife of Dent Lamar, who died intestate before her brother, leaving her five children, by Dent Lamar, her heirs at law, viz: M. D. Lamar, O. C. G. Lamar, Sarah Lamar, John Lamar, and Mary E., now Smith, and who is plaintiff.

The heirs at law of O. C. G. Moss, employed Dent Lamar, the father of plaintiff, to go to Louisiana and settle the Moss estate for them. The property of the estate seems to have been divided, and Dent Lamar received this *property* for those heirs of O. C. G. Moss who lived in Alabama. Dent Lamar received negroes for Mrs. Morris, and delivered them to her husband, and he received for his children four negroes and some cotton—how much is not shown.

The estate of O. C. G. Moss was supposed to be worth \$27,000; of this the children of Mrs. Lamar were entitled to one-sixth, or \$4,500, and the plaintiff to one-fifth of one-sixth, or \$900. Dent Lamar returned from Louisiana with the property of the distributees about January, 1856. He settled with some of his children, and spoke of settling with others on various occasions in 1868 and 1869, and at some of these times spoke of conveying to them real estate. One of the negro slaves he got from the "Moss estate," for his children, died before the war, and the others were emancipated by the war. While these negroes were slaves, Dent Lamar held them as bailee, or in trust, for his children; spoke of them as "belong to you children," and refused to dispose of them because they did not belong to him, but to "you children."

There is no proof as to the quantity or value of the cotton Dent Lamar received for his children, nor is there any proof of the value of the negroes he received for them. Dent Lamar, after the "surrender," began to fail, his memory became impaired, and he continued to grow worse till in

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1868 he lost his mind entirely, and on the 10th of July, 1869, was declared a lunatic or *non compos mentis*. He died in September, 1870. Letters of administration were granted to defendant, Fellows, on the 9th of November, 1870.

Nunn testified that, as agent for plaintiff, he spoke to Fellows, as administrator, about plaintiff's claim, and informed the defendant of it about April, 1872. The plaintiff was born 9th of February, 1850. Fellows testifies that the first conversation about which Nunn testifies, took place in 1873, about April, and gave circumstances to sustain his recollection. He also testifies that he was never informed of the nature of the claim, or the amount thereof, nor when it was due; nor was any claim in writing ever presented to him on behalf of plaintiff, and he never knew the character of plaintiff's demand, when it became due or its amount, till he heard it from plaintiff's witness on the stand, after the trial began. Nunn also testified, "Neither defendant or witness *knew the amount of said claim.*"

The complaint consists of two "common" counts: one for money had and received, and one on account stated, with averments as to both counts, that plaintiff was an infant when the money was received and when the account was stated, and that the amount was her statutory separate estate. To this complaint the defendant pleaded the general issue—the statute of limitations of three and six years, and also the statute of non-claim; and that more than three years had elapsed after plaintiff became of full age before she brought this suit. Also, that Dent Lamar was *non compos mentis* at, and for a long period before the time, it was alleged that he stated the account.

After the testimony was all in, except a part in rebuttal, the plaintiff moved the court for leave to amend the complaint by adding thereto a count claiming twelve hundred dollars for money had and received by the defendant's intestate on the 1st day of May, 1869, as plaintiff's trustee, and in trust for her use. The defendant objected to the amendment, and the court refused leave to amend as proposed, and the plaintiff excepted.

After the conclusion of the evidence, the court charged the jury generally as to the law under the evidence that would entitle plaintiff to recover. The court then gave a charge at the request of defendant, to which plaintiff excepted, when the court then added, "that they must consider said charge in connection with what had been given in the general charge on the same point." All of the material charges ruled upon are set out in the opinion.

The appellant now assigns as error—

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1st. The refusal of the court to allow him to amend his complaint.

2d. In giving the charge excepted to.

3d. All other errors in the record.

REID & MAY, and BRAGG & THORINGTON, for appellant.—1. The proof had shown that plaintiff's claim arose out of a direct trust, and the court erred in refusing to allow the plaintiff to amend her complaint by inserting a count of this character.—*Crimm's Adm'r v. Crawford*, 29 Ala. 626.

2. The court erred in giving the charge asked by appellee and excepted to by plaintiff. The proposition set out in said charge was never the law. The language of said charge was used at an early day in *Bigger, Adm'r, v. Hutchings*, 2 Stew. 445, not as laying down the law, but merely suggesting a form of presentation, intelligible and enduring, so as to avoid dispute about presentation of claims. The rule was differently laid down in *Jones' Ex'r v. Lightfoot*, 10 Ala. 17. See, also, *Pollard v. Sear's Adm'r*, 28 Ala. 486; 20 Ala. 680; *Hallet & Walker, Ex'rs, v. Branch Bank of Mobile*, 12 Ala. 196, 197; *Harrison's Adm'r v. Jones' Adm'r*, 33 Ala. 260; *Frazier's Ex'rs v. Proytor*, 36 Ala. 694.

3. Upon the facts of this case, an action will lie for money had and received for the plaintiff's use.—*Hitchcock et al. v. Lukens & Son*, 8 Port. 33, and authorities cited; *Jutt v. Ide*, 3 Black. C. C. 249; *Williams v. Hill*, 19 How. 246.

FELLOWS & JOHNS, *contra*.—1. The loose, vague, and incoherent declarations of Lamar to his children, when his mind was fast decaying, should have little weight; but give them full force and they are wholly insufficient to fix on him a liability for any amount of money had and received.—*Fuller v. Duren*, 36 Ala. 73.

2. The case of *Fuller v. Duren*, *supra*, and of *Vincent v. Rodgers*, 30 Ala. 471, and many other authorities, show conclusively that the action for money had and received cannot be maintained upon the facts shown in this case.

3. If the plaintiff had any right to recover, then the original complaint gave her as much right as the amendment would have given, and the refusal to allow the amendment was not unjust nor erroneous. If there was error, it was without injury.

4. The charge given, and excepted to by plaintiff, was correct by itself; it was certainly correct with the explanation by the court "to consider it with the general charge on the same point." This charge was gotten up on the authority of *Bigger's* case, in 2 Stew. 445. This case has since been

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approved by Supreme Court and adhered to, and it is now too late to question it. Upon this point, and as to what constitutes a sufficient presentation, see *Jones v. Lightfoot*, 10 Ala. 17; *Pipkin v. Hewlett*, 7 Ib. 291; *Clark v. Washington*, 44 Ib. 291; *Halfman v. Ellison & Son*, 51 Ib. 543.

5. If said charge did tend to mislead the jury, that is not a reversible error, because the party excepting did not ask an explanatory charge.—*Abraham Bro. v. Flinn*, 42 Ala. 51; *Scully v. State*, 39 Ib. 240; *Fitzpatrick v. Hays*, 36 Ib. 684.

STONE, J.—“All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary or of administration; and if not presented within that time, are forever barred.—Code of 1876, § 2597.

The provisions of the preceding section do not apply to minors, or persons of unsound mind, who are allowed eighteen months after the removal of their respective disabilities, or to heirs or legatees claiming as such.”—*Ib.* § 2598. The provisions of the preceding sections, with some modification not material to this case, have been of force since 1815—before we had a State government; and they have been frequently construed in this court. The purpose of this statute was to promote a speedy, safe, and definitive settlement of estates, by giving the personal representative notice and knowledge of all claims against the estate in his hands. Having such knowledge, he can determine advisedly when it is his duty to report the estate insolvent; and, at the end of eighteen months, if the claims presented are not equal to the available assets, he can safely pay debts, or make distribution, total or partial, as the condition of the estate may warrant. Moreover, such presentation informs him whether or not the claims against the estate exceed the amount of its personal assets, and whether or not he can safely surrender the lands of the estate to the heirs or devisees; or, whether it is his duty to petition for an order to sell the lands for the payment of debts. These patent results of the statute go to make up a policy, to which it is the duty of the courts to give full effect.

What will amount to a sufficient presentation, is a question which has been many times before this court. In *Bigger v. Hutchings*, 2 Stew. 445-8, our predecessors said, “The original bond, note or contract on which the debt accrued, or at least an abstract or copy, should be presented as evidence of the claim, and if the claim arise on an open account or legal liability, it should be reduced to writing, and be so pre-

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sented." So, in *Jones v. Lightfoot*, 10 Ala. 17, the court reaffirmed the rule laid down in *Bigger v. Hutchings*, *supra*, and said, "The plain and obvious design of the statute was, to enable distributees and legatees to demand a distribution of the estate at the expiration of eighteen months from the grant of letters, unless it was necessary for the executor or administrator to retain it longer in his hands for the purpose of paying debts. To justify him in so doing, he must be furnished with the evidence that claims exist against the estate and will be enforced. This evidence the statute requires to be a *presentment* of the claim, and in our opinion nothing short of an actual presentment will satisfy its demand." In the same case it had been decided that "knowledge merely of the existence of a claim is not sufficient, and to hold that it was, would be, in effect, to repeal the statute." So, in *Hallett v. Br. Bank*, 12 Ala. 193, this court ruled that a notice of protest, coming from a notary public, and served on the personal representative, or otherwise shown to have come to his hands, "will be sufficient to withdraw the claim from the influence of the statute of non-claim, if it describe the bill or note with accuracy, and informs the representative who the holder is, and that he looks to the administrator for payment." This is put on the ground that the notary, in that capacity, is authorized to receive payment of the bill or note.—See, also, *Pharis v. Leachman*, 20 Ala. 662, 678; *Pollard v. Sears*, 28 Ala. 484; *Harrison v. Jones*, 33 Ala. 258; *Fretwell v. McLemore*, 52 Ala. 124, 142; *Frazier v. Prater*, 36 Ala. 691; *Budger v. Kelly*, 10 Ala. 944; *Pipkin v. Hewitt*, 17 Ala. 291; *Posey v. Decatur Bank*, 12 Ala. 802. The result of our rulings on this question is, that to constitute a sufficient presentation, the nature and amount of the claim must be brought to the attention of the personal representative, by some one authorized in law or fact to make the presentation, and the representative must be notified, expressly or impliedly, that the estate is looked to for payment. Less than this does not meet the purpose of the statute, or sufficiently inform the representative, to enable him to determine whether or not he will pay the claim, whether or not the estate is solvent, and whether or not he will pay debts in full, assent to legacies, surrender the real estate to heirs or devisees, and make distribution. All our decisions are reconcilable with this view, and it maintains the true rule and policy of the statute. This rule has existed too long without material judicial or legislative change, to be open to reconsideration in this court. We feel bound, both by authority and reason, to adhere to it.

We feel also bound, as a corollary of the above, to adhere
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to that other principle declared in *Bigger v. Hutchings, supra*, that where the claim is "an open account or legal liability, it should be reduced to writing, and be so presented." Less than this would not be sufficient information for the representative to base action upon. Moreover, the statute, Code of 1876, § 2599, declares that "the presentation may be made either to the executor or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate in which letters were granted." To file such claim in the office of the judge of probate, it must necessarily be reduced to writing, unless it is itself a written contract. It is manifest that the requisites of a valid presentation must, in each of these optional methods, be substantially the same. The object to be attained is in each case the same, and it is common logic to hold that the quantum of information to constitute presentation must, in each case, be substantially the same. It is not unreasonable, therefore, when given facts and circumstances are relied on as proof of personal presentation, to inquire whether they would be sufficient, if filed in office of the judge of probate, and entered on his docket.—See, also, *Waddell v. John*, 57 Ala. 93.

The charge numbered four, given at the instance of defendant in the court below—appellee here—is strictly in accordance with these views, as far as the same are applicable to the facts of this case. But, in the present case the plaintiff was a minor when Fellows received his appointment as administrator; and consequently the statute of non-claim did not commence to run, until she reached her majority, some months afterwards. The charge numbered four, ignores plaintiff's minority. It instructed the jury that plaintiff could not recover, "unless her claim was presented to the administrator, or filed in the probate court of the county within eighteen months after the date of the grant of letters to the defendant." The court then told the jury "they must consider said fourth charge in connection with what had been given in the general charge on the same point." The general charge on the subject of presentation instructed the jury that to authorize plaintiff to recover, "they must find from the evidence that the claim was presented to the defendant, as the administrator of the estate of Dent Lamar, deceased, by the plaintiff, or by some one authorized to present the claim, within eighteen months after the grant of letters of administration on said estate to the defendant, if the plaintiff was twenty-one years old when said letters were granted; or, if the plaintiff was a minor when such letters were granted, then the claim must have been presented within eighteen months after she became twenty-one years

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of age." This general charge stated the law correctly and fully, applicable to the facts of this case; and the explanatory charge given in connection with charge four, rendered it practically impossible that the jury could have been misled. The proposition of the charge excepted to asserts the general principle correctly; and if appellant was apprehensive it would mislead the jury, owing to the special and exceptional facts of this case, it was the privilege and duty of her counsel to ask an explanatory charge. A charge given, which is objectionable alone on the ground of its tendency to mislead, is no ground of reversal.—*Hemingway v. Garth*, 51 Ala. 530; 1 Brick. Dig. 326, § 10.

We can not perceive that the refusal of the court to allow plaintiff to file an additional count, worked any injustice. The bill of exceptions sets out all the evidence, and there does not appear to have been "any mistake in the christian or sur-name of either party, sum of money," &c., as contemplated in section 3157, Code of 1876. The original complaint contained a count for \$3,000, had and received. Under this count the plaintiff could recover that, or any less sum, if she proved her cause of action. Claiming more than is proved to be due, is no obstacle to a recovery in this form of action. And, if intestate received and held the money as trustee, and there were no unsettled matters of account growing out of the trust—(none were claimed in this case)—the action for money had and received would lie.—See *Hitchcock v. Lukens*, 8 Por. 333; *Vincent v. Rogers*, 30 Ala. 471. It is worthy of remark that the count offered as an amendment, while it seeks to charge Lamar's estate for money received by him as trustee, does not aver that any demand of the money was ever made. See complaint in *Vincent v. Rogers*, *supra*. On the other hand, if Lamar did hold the funds in trust, and there were unsettled accounts growing out of it, he could not be held to account for them in an action at law.—*Vincent v. Rogers*. In any view we can take of this question, we can not perceive that the amended complaint presented a cause of action, not fully covered by the original complaint, and the City Court did not err in refusing to allow the amendment.

There is no error in the record, and the judgment of the City Court is affirmed.

[Avery, Adm'r, v. Ware et al.]

Avery, Adm'r, v. Ware et al.*Bill in Equity for an Account.*

Bill for account; when without equity because account adjustable at law.—A. and W. were judgment creditors of V. for unequal amounts, having the same attorney through whom the judgments were compromised for an aggregate sum, which was to be applied to the judgments in proportion to their respective amounts. W. had received more than he was entitled to, and the attorney had a sum on hand which he was willing to pay to the party entitled to it. A. filed a bill praying a decree declaring her entitled to the money on hand, and for a decree against W. for the excess received by him above his proportion of the aggregate amount of the compromise,—*held*, that the bill was without equity; the demand being purely legal, its amount ascertainable by simple calculation, and the remedy at law adequate.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. N. S. GRAHAM.

The case may be understood from the opinion.

J. J. ROBINSON, and W. H. DENSON, for appellant.

JAMES T. MAY, *contra*.

BRICKELL, C. J.—The statements of the bill are, in effect, that the complainant, who is appellant here, and the appellee Jonathan Ware, were judgment creditors of Alexander Varner, having the same attorney. The judgments were for unequal amounts; and through their attorney, were compromised for an aggregate sum, which was to be applied to the judgments in proportion to their respective amounts. Ware has received more than he was entitled to receive, and there is a sum remaining in the hands of the attorney he is willing to pay to the party entitled to receive it. The prayer is for a decree declaring the complainant entitled to the money in the hands of the attorney, and for a decree against Ware, for the excess above his proportion of the aggregate amount of the compromise which he has received. A demurrer to the bill, for want of equity, was overruled, but on a final hearing it was dismissed, on the ground that the evidence did not support its allegations.

If the equity of the bill can be maintained, it must be on the theory that there is an account to be stated and settled between the parties. It is not every matter of account of which a court of equity takes jurisdiction. There must be

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a fiduciary relation between the parties, or mutuality or complication of accounts to justify the intervention, or, as is said in *Knotts v. Tarver*, 8 Ala. 743, the court would be filled with suits, which could be better and more cheaply adjudicated in courts of law. Where the accounts are all on one side—where, as in the present case, the demand is purely legal, and its amount ascertainable by a simple calculation, and the remedy at law is adequate, the court will not take jurisdiction.—*Kirkman v. Vanleer*, 7 Ala. 217; *Crothers v. Lee*, 29 Ala. 337; *Dickinson v. Lewis*, 34 Ala. 638. An examination of the evidence is not necessary, for if it supports the averments of the bill, it discloses a case in which the court should not have interfered.

The decree must be affirmed.

Piedmont & Arlington Life Insurance Company v. Young.

Action for Breach of Contract on Insurance Policy.

1. *Life insurance; its benefits and abuses.*—Life insurance, conducted on proper economic principles, is a prudential and valuable investment; but if premiums be adjusted on a fancy schedule, with a view of enriching corporations or furnishing undue compensation to a horde of employees, &c., the evils of the system exceed all benefits. In deciding the various questions arising in the dealings of such companies with policy holders, the court can not shut its eyes to abuses to which the business is subject, the fanciful and speculative representations often made by agents, and the technical and exacting conditions frequently contained in policies, to the prejudice of the assured.

2. *Verbal notice; when sufficient.*—Where application or notice is required to be in writing, verbal notice will be sufficient, unless timely objection be made thereto.

3. *Conditions of policies; how construed.*—The conditions and duties of the assured in the policy, are, in general, to be liberally construed in favor of the insured and strictly construed against the insurer.

4. *Responsibility for acts of agent; failure of notice.*—Where insurance companies transact business through agents, at a distance from the home office, they are bound by the acts of such agents within the general scope of the business, and can not avoid responsibility by instructions, limiting their agent's authority, not brought to the notice of persons dealing with them.

5. *Testimony of table-rates; when inadmissible.*—Where a policy shows on its face that it is of the class called "participating,"—especially where the assured so understood it at the time it was obtained—testimony of table-rates of the company for premiums of other kinds of policies, is inadmissible to show that the rate of premium paid was that fixed for a different kind of policy, when it is not shown that such table-rates were brought to the notice of the assured.

6. *When insurer estopped from denying kind of policy, &c., held by assured.*—Where an assured had obtained what he believed to be a "participating" policy, and verbally notified the agent, some time before the next premium fall due, that he wished a paid-up policy, and the agent stated, "it was all right,

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and he would attend to it," and several times afterwards being approached by the assured, said "it would be attended to," the company is estopped from saying that the assured did not hold a participating policy, and that the one held by assured had, by its terms, been forfeited for non-payment of premiums.

7. *Assignment of policy; when not void.*—Where a policy was issued on the life of a debtor for the benefit of a firm, as his creditors, and provided that it should not be transferred without the approval of the company, a transfer by one partner, of his interest, to another partner, will not avoid the policy nor defeat the transferee's right of action therein, especially where, by the death of the transferring partner, the legal title is cast on the plaintiff as surviving partner.

8. *Necessity of enacting laws on this subject; legislative attention solicited.*—The court avails itself of this occasion to invite the attention of the legislature to the necessity of enacting laws protecting policy holders against the fraud and insolvency of insurance companies, by requiring them, as a condition to doing business, to maintain a reserve of assets, sufficient in amount, at a fixed rate of interest, to cover their liabilities, as is now provided in some of the States, or in such other mode as its wisdom may suggest.

9. *Same.*—The court also refers to the need of amending the laws against obtaining money by false pretenses, so as to prevent and punish the reckless misrepresentations so often indulged in by soliciting agents.

10. *Same; explanation.*—Lest its language may be misunderstood, the court adds that, "it found no evidence of fraud or misrepresentation by the agent in this case, nor does the record furnish evidence of intentional wrong on the part of the company."

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Edward B. Young, sr., against the Piedmont & Arlington Life Insurance Company, to recover damages for an alleged failure by said company to comply with what are claimed to be the stipulations of a policy of insurance, issued on the 11th day of January, 1869, by said company. The policy was issued on the life of one Thomas A. Brannon for the benefit of a firm composed of the plaintiff and one Woods, the said Brannon being indebted to said firm for \$10,000, which was the amount of the policy. The premiums were paid each year—from January 11, 1869, to January 11, 1871, being \$426.00 each. On the 25th November, 1869, Woods assigned his interest to his partner, the plaintiff, which assignment was written and approved by one A. A. Walker, the agent of the company who issued the policy. After the payment of the first and before the payment of the second premium, the said company took the place of the Piedmont Real Estate Company, and became responsible for the latter's obligations. Subsequent to the transfer of the policy and before suit brought, the said Woods died, leaving the plaintiff Young the only surviving partner of said firm. In December, 1871, about a month before the premium payable January 11, 1872, was due, the plaintiff notified said Walker, the company's agent, that he did not intend to pay any more premiums on said policy, but wanted a paid-up

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policy for the even dollars of premiums paid, as stipulated in the conditions of the policy. Walker replied that it was all right and he would attend to it—and upon being afterwards approached, made the same reply. The company refused to issue a paid-up policy or to return the premiums.

On the back of the policy is a printed "Notice," to which allusion is made in the policy, in the following words: "Accepted by the assured as forming a part of this contract." In this notice so "forming a part of this contract," there is a stipulation or provision in these words: "If, after the payment of not less than two annual premiums, an ordinary life policy, with profits, should cease by the non-payment of premiums, then, upon written application of the assured within thirty days from the time of such ceasing (exclusive of the thirty days grace) a new policy will be issued for the amount of cash premiums in even hundreds of dollars received by said company."

The appellee claims that, by the terms of the contract, he was entitled to make, and did make substantially, an application for a new or paid-up policy at the time, in the manner and upon the conditions required by the contract, and that appellant violated the contract in failing and refusing to issue the same to him. Appellant denies this assertion. Appellee also claims that appellant, by its agent, waived a strict compliance with the terms of the contract in reference to the application for a paid-up policy. Appellant denies, 1. That said company, or appellant, ever contracted to issue any new, or paid-up policy, in any event; 2. That appellee has any right to ask for or receive such policy; 3. That application for such paid-up policy was ever made; 4. That appellant ever waived any rights or stipulations of the contract.

It is also claimed by the appellee that three years having expired, the appellant can not, after that time, by the provisions of the contract, take any advantage of any false representations made in the application, or of any failure to comply with the terms upon which the company agreed to issue the new or paid-up policy. The appellant denies that there are any provisions in the contract by which the company waived any of the terms or stipulations which prohibit its agent from waiving or varying the terms of the contract at any time; but states that there is in the "notice" which the parties "accepted as a part of the contract," an express provision that an agent should not have the power or authority to alter, vary or waive any part of the contract, and notice to the same effect is printed on the margins of the policy, and of the application, and on the renewal receipts.

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On the trial, exceptions were reserved by appellant to the rulings of the court in admitting the following in evidence before the jury :

1. Conversations between A. A. Walker, appellant's agent, and E. B. Young, in December, 1871, in reference to obtaining a paid-up policy.

2. Conversation between Thos. A. Brannon and A. A. Walker on the same subject, about the same time.

3. Conversation between J. H. G. Martin and Thos. A. Brannon, on the same subject.

4. The renewal receipts.

And appellant reserved exception to the ruling of the court in refusing to allow the proof, that after a careful examination of the books in the office of the company, in Richmond, no entries could be found in reference to the application for a paid-up policy. And also in excluding from the jury a pamphlet or circular offered, which the witness stated was substantially the same as the one referred to in the application as "Table No. 1, pamphlet," or any part thereof, which pamphlet, as evidence, was objected to by appellee, on the ground that no proof was offered that it had been exhibited to any of the parties at the time the contract was made.

Other exceptions were reserved to the rulings of the court by the appellant, all of which are now assigned as error.

JOHN A. FOSTER, and E. J. KIRKSEY, for appellant.—1. The testimony "that the first premium was paid out of the funds of Young & Woods," should have been excluded. The company and said firm, and the agent, regarded Brannon as the party who contracted to pay the premiums. If another shall step in and pay the premiums, and appellant shall accept them, this payment can not change the contract so as to confer the right of Brannon upon the party so paying. The testimony, then, is irrelevant where Brannon is not a party. Even if Young & Woods acquired any right, E. B. Young, the appellee, is not "Young & Woods," nor does he sue as surviving partner; then how can appellee stand in their shoes? The assignment to him is wholly void. It was not made as prescribed in the contract. And Walker's action in writing and approving the transfer, is no waiver of the stipulations of the company, because the contract itself, expressly says that an agent shall not make such waiver. Appellee must have known this, and if he was careless in not reading and understanding the contract, he alone is responsible.—*Ervin v. N. Y. Central Ins. Co.*, 3 S. C., 213 (New York). The transfer being void, and appellee being the only plaintiff in

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the action, none of the proof of payments made are pertinent. *Smith v. Saratoga County Company*, 1 Hill, 497 (N. Y.); S. C. 3 Hill, 508; *Bennett & Martin v. Eufaula Home Insurance Company*, 46 Ala. 9; *Governor v. Campbell*, 17 Ala. 566; *Pike v. Elliott*, 36 Ala. 69; *Mann v. Herkimer County Insurance Co.* 4 Hill, 187; *Boddle v. Chenango County Insurance Company*, 2 N. Y. 53; *Van Buren v. Wells*, 19 Wend. 203; *Elliott v. Gibbons*, 31 N. Y. 67.

2. The conversations between Walker, the agent, and appellee, and between Walker and Brannon, should have been excluded, because they do not relate to the performance of the stipulations. The contract is, that the "assured," in writing, must make the application for a paid-up policy to the home office within the period stipulated in the policy. The paid-up policy, moreover, can issue in behalf of the same beneficiaries only for whom the original was drawn, as they alone are entitled to all the proceeds of the latter, in whatever form, and, if any change is desired in policies issued, the old policy *must* be returned to the home office *before* another policy issues in its stead.—*Breasted v. Farmers Loan & Trust Co.* 4 Hill, 73, and S. C. 8, N. Y. 299; *Fowler v. Mutual Life Insurance Company*, 4 Laws. 202 N. Y.; *Van Zandt v. Mutual Benefit, &c.* 55 N. Y. 169; *Horton v. Equitable Life, &c.*, 2 Albany Law Jour. 255; *Beadle v. Chenango County Ins. Co.* 3 Hill, N. Y. 161. The books, though full of authorities to sustain the principle that an agent may waive the conditions, but in all we can find no authority which goes to the length of saying that an agent can waive stipulations when there is a printed notice on the back of the policy depriving him of that power, to which allusion is made as a part of the contract in the policy.—See *Mound City Ins. Co. v. Huth*, 49 Ala. 530; 1 Phillips on Insurance, 68; Story on Agency, 19; 2 Greenl. 215; May on Ins. § 143.

3. The court erred in excluding as evidence, the pamphlet, "Table No. 1," showing the tables of rates on thirteen different plans, and explanations of these tables, showing the conditions and advantages of the company in its business. The only objection by appellee to the introduction of the several parts of this pamphlet was that no proof was offered that it had been exhibited to any of the parties at the time the contract was made. All other objections are to be considered waived.—See numerous cases in 1 Brick. Dig. p. 887, § 1194. (The argument then goes on to show that the parties did know of the pamphlet, &c.)

4. The testimony of the witness, Shields, as to what are now the rates of appellant on policies *with profits* and *without profits*, should have been admitted. The Alabama decisions

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cited in 1 Brick. Dig. p. 809, § 81, leaves no doubt as to the error of the court in excluding it.

5. (The brief contains several other points, which, if material, can not be here condensed with justice to the arguments sustaining them.)

S. H. DENT, *contra*.—1. Was the policy such a contract as gave the plaintiff the right to demand a paid-up policy for the even dollars of premium paid? In the solution of this question, we must be guided by the contract or policy. It is evidently a policy with profits, or a "participating" policy. The words printed on the margin are significant or conclusive on this question.—*Patrick & Wife v. Phoenix Mutual Life Insurance Company*, 44 Vt. 481; S. C. 3 Bigelow's Life & Accident Ins. Reports, 777. For rule as to construing policies, see *M. & M. & D. M. Ins. Co. v. McMillan & Son*, 27 Ala. 77. The appellants failed to lay a proper predicate, for the introduction of the evidence about "Table No. 1," by failing to show that the said table or pamphlet offered, was shown to plaintiff (appellee).

2. Was the demand made by Young of Walker a substantial compliance with the contract, or was the conduct of Walker, the agent of the defendant, a waiver of the requirement in the policy that the demand should be in writing?

We insist that Walker, as the general agent of the company, had the right to bind the company by his conduct, and to waive that requirement of the contract which called for the demand in writing.

The acts of the agent, acting within the apparent scope of his powers, binds the company.—Bliss on Life Insurance, pages 438-9, 443, 449-50.

We make this further point, that the contract being complete in itself, no parol evidence was proper to change or vary that contract. If the policy did not correctly represent the contract and there was a mistake, then the only forum in which that mistake could be corrected, is in a court of chancery.—1 Brick. p. 680.

As to the demand being made of the agent and the company being bound by his acts, see the following authorities: *Carriage v. Atlantic Ins. Co.* 40 Geo. 135; *Miller v. Phoenix Ins. Co.* 27 Iowa, 203; *Walsh v. Aetna Life Ins. Co.* 30 Iowa, 133; *Miller v. Mutual Ben. Life Ins. Co.* 41 Iowa, 216; *Van Allen v. Farmers' Joint Stock Ins. Co.* N. Y. Supreme Court Reports, 11, 4 Hun. p. 413, and the authorities there cited, which are many and full. The head-note of this last case is as follows: "A general agent of an insurance company may waive the performance of a condition inserted in the policy

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for the benefit of the company."—See, also, last quoted from 4 Hun. N. Y. p. 800; the case of *Shear v. Phoenix Mut. Life Ins. Co.* and the authorities there cited, to the same effect as last case and head-note quoted above; also, Brick. Dig. vol. 1, p. 63, §§ 159, 160 and 161; 53 N. H. *Currier v. Continental Life Ins. Co.* p. 538; Bliss on Life Ins. pp. 620, 621.

The right to maintain this action, if the refusal to issue the policy was wrongful, is abundantly shown by the following authorities: Bliss on Life Ins. p. 673, § 425; *McKee v. Phoenix Ins. Co.* 28 Mo. p. 383; 1 Brick. p. 141, §§ 75, 76, 77; *Brasswell v. Am. Life Ins. Co.* 75 N. C. 8.

In respect to the transfer to Young by Woods, no question was raised on that in the court below; but I see it is raised here by the brief of counsel. I refer to the following authorities to show that there is nothing in that point, even if the agent of the company had not approved the transfer: *Burnett & Martin v. Eufaula Home Ins. Co.* 46 Ala. 11, and the authorities there cited; *Pierce v. Nashua Fire Ins. Co.* 50 N. H. 297. The transfer was by one of the original partners to the other.

3. (The brief goes on to discuss the demurrers, evidence and charges).

STONE, J.—Life insurance, like fire insurance, conducted on proper economic principles, is, no doubt, a prudential and valuable investment. Its tendency is to equalize and adjust the burden of domestic sustentation, so as to provide for the families of the short lived, at the expense of those who live longer. The annual premiums paid by the assured, are graduated by the average length of human life; so that the families of those who are cut down before they reach the average age, share in the surplus paid in by those who are spared beyond that period. To this common fund to meet death losses, there must be added a sufficient sum to defray the administration expenses of the institution, with a margin to cover contingent excessive mortality. Properly conducted, with a view to these ends, and only to these ends, life insurance is worthy of public patronage.

But if the premiums be adjusted on a fancy schedule, with a view of enriching the corporators, or of furnishing undue compensation to a numerous army of officers and employes, or of squandering the accumulations in extravagance or ill-advised experiments, then the evils of life insurance exceed all possible benefits that can be derived therefrom.

Since the close of the late sectional war, life insurance has become a business—we may say, a large business—in the Southern States. Agents have flooded the land, and have

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vied with each other in extolling its benefits in general, and particularly the excellencies of the companies represented by them respectively. Each insurance company has been, in turn, praised for some boasted specialty, which it was contended should commend it to particular confidence and patronage. When one agent failed to convince, another, more fluent or more reckless of speech, has succeeded in overcoming all objections raised; and the result has been that millions, which the South was poorly able to part with, have found their way into these institutions, which only here and there a death loss paid, has gladdened one family, and furnished to the company an occasion for trumpeting to the world the beauties and benefits of life insurance. Policy holders have suffered grievously, in the matter of excessive premiums exacted from them, to meet a too expensive administration of the affairs of such corporations.

Another fruitful source of loss to policy holders, has been the numerous and disastrous failures of life insurance companies. Such failures, when the companies have succeeded in establishing a business, are without excuse, and should be ascribed to incompetent or dishonest administration. The losses from these failures have been very great.

But there has been another cause of loss to the policy holder, which has been much more severely felt than either of these. In making application for a policy, the applicant only sees and knows the soliciting agent. Large dividends to be distributed, and reduction of premium as a consequence thereof, are among the benefits he is assured will accrue to him. Two propositions are prominently presented to him; gradual reduction of the annual premium he will be required to pay, and the gross sum his family will enjoy at his death. And, in most cases, he is informed that after paying a given number of annual premiums, should he be unable or unwilling to make further payment, he can obtain a paid-up policy, for the proportion of payments made by him. All this occurs before he receives his policy. Nothing said to him of the strict process by which he is to obtain a paid-up policy, or of the many clauses formed in the body of the policy, or in the note endorsed upon it, which look to a forfeiture of the insurance. When the policy comes, he usually puts it away without perusal; or if he read it, and be not skilled in the law, the probabilities are that he will not understand the technical strictness required of him. He knows only the soliciting agent in the transaction, and he looks to him, and to him alone for counsel.

We do not say the portraiture above is the universal rule. There are honorable exceptions to it, both in companies and

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agents. But the picture we have hastily drawn, is of sadly frequent presentation. The hundreds, if not thousands of confiding persons, who, when they asked for paid-up policies, or cash surrender values, have been met with the cold response that, by reason of some strict rule they had failed to observe, their policies were forfeited, will attest the fidelity of the sketch. But these views are not entirely original with us. The deceptions practiced by life insurance companies, through agents of their own appointing, have several times called forth the animadversions of the courts of the country.

In *Insurance Company v. Wilkinson*, 13 Wal. 222, 234, the court said, "It is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows any thing about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance, as the full and complete representation of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decis-

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ions in this country, is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal."

In *Miller v. The Mutual Benefit Life Insurance Company*, 31 Iowa, 216, 226, speaking of the powers of a soliciting agent, and of notice to him, the court said: "It is quite time that the technical constructions which have pertained with reference to contracts of this kind, blocking the way to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals. It follows that, in our opinion, the court did not err in instructing the jury that the defendant was bound by notice communicated to its agents."

In *Van Allen v. Farmers' Joint Stock Ins. Co.* 4 Hun. (N. Y.) 413, it is said, "A parol waiver of a condition in a policy is good, notwithstanding a provision in the policy that nothing but a written agreement, signed by an officer of the company, shall have that effect. A general agent of an insurance company may waive the performance of a condition inserted in the policy for the benefit of the company."

In the case of *Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465, the question raised was whether the insurance company was liable for acts, representations and omissions of duty on the part of its agent. The defense was, that in the service complained of, the agent was acting outside of his authority, and that he was, *pro hac vice*, the agent of the assured. He had been furnished by the company with printed blank proposals, containing proper questions to be answered by the applicant; and he was authorized to receive and forward applications for insurance. The court said, "We think there must be an incidental power in the agent, adequate to the explanation of the description of property which is to be insured, or the meaning of words and phrases, and the application of answers to the subject matter. We do not say that an insurance agent is, of course, a general agent, with no limitation; but, only that he is, in certain cases, clothed with an incidental power to perfect that which is committed to his care. The agent was to obtain and forward a perfect application. It was within the sphere of his

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duty to explain the questions, and decide for himself and the *bona fide* applicant, what was a satisfactory answer, and how the answer should be applied to the subject. In such a case, the agent can not be said to make the insurance himself, but his principals do it at the home office, obtaining only through him the necessary information." And the company was held bound by his acts.

In the case of *Rowley v. Empire Ins. Co.* 36 N. Y. 550, it was declared that "a policy of insurance should not be avoided for an error by the agent of the company, acting within the general scope of his power, on the artificial and unwarranted assumption that he is the agent of the other party to the contract."

In *May on Insurance*, § 143, is the following language: "It has, in fact, been very generally held that knowledge by, or notice to the agent, of the inaccuracy of a statement in the application upon which a policy is issued, after such notice or knowledge, binds the company and prevents them from availing themselves of the inaccuracy in defense, some of the cases regarding the facts as amounting to a waiver, and others as working an estoppel *in pais*. And this is true even when the policy provides that when the application is made through an agent of the company, the applicant shall be responsible for such agent's representations. And, indeed, the tendency of the courts generally, is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy, and bind the company by such waiver."

This is supported by a vast array of authorities. Substantially the same doctrine is asserted in *Bliss on Life Insurance*, §§ 281, 287, 288. See, also, *Beebe v. Hartford Ins. Co.* 25 Conn. 51; *Lightbody v. North Amer. Ins. Co.* 23 Wend. 18; *Plumb v. Cataragus Co. &c.* 18 N. Y. 392; *Coreelis v. Hannibal Sav. Ins. Co.* 43 Mo. 148; *Hodgkin v. Farmers' Mut. Ins. Co.* 34 Barb. 218; *May on Insurance*, § 144; *Woobury Sav. Bank v. Charter Oak Ins. Co.* 31 Com. 517; *Hanitz v. Equitable Ins. Co.* 40 Mo. 557; *Beal v. Park Ins. Co.* 16 Wis. 241; *Davenport v. Peoria Ins. Co.* 17 Iowa, 276; *Howard Ins. Co. v. Bruner*, 11 Har. (Penn.) 50; *Lycoming Ins. Co. v. Schollenberger*, 8 Wright, 259; *Currier v. Continental Life Ins. Co.* 53 N. H. 538; *Alman, Miller & Co. v. Phoenix Ins. Co.* 27 Iowa, 203; *Cannegi v. Atlantic Fire Ins. Co.* 40 Geo. 135; *Post v. Aetna Fire Ins. Co.* 43 Barb. 351; *Ames v. N. Y. Union Ins. Co.* 14 N. Y. 253; *Carrol v. Charter Oak Ins. Co.* 38 Barb. 402; *Van Bories v. U. S. Life Ins. Co.* 8 Bush. (Ky.) 133; *Benedict v. Ocean Ins. Co.* 31 N. Y. 389; *Smith v. Aetna Ins.*

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Co. 5 Lansing, 545; Walch v. Aetna Life Ins. Co. 30 Iowa, 133; Haugh v. City Fire Ins. Co. 29 Conn. 10.

So, it seems that where application or notice is required to be in writing, verbal notice will be sufficient, if not objected to.—See *Liddle v. Market Fire Ins. Co. 29 N. Y. 184; Bachen v. Williamsburgh City Ins. Co. 35 N. Y. 131; Bodime v. Exch. Fire Ins. Co. 51 N. Y. 117.*

Insurance policies are framed by insurance companies with great care and caution, with a view of limiting their liability as much as possible; and in most cases impose conditions and duties on the assured, to be performed with marked particularity. They should be, and are liberally construed in favor of the assured; which conditions and provisos are strictly construed against the insurer.—Bliss on Life Ins. § 404.

The policy, in the present case, shows on its face that it is of the class called “participating.”—See 1 Phil. on Ins. 47; *Patch v Phoenix Mut. Life Ins. Co. 44 Verm. 481.* We think Mr. Young so understood it at the time it was applied for and obtained, and there is no evidence in the record tending to show the contrary. The testimony of the table rates was rightly ruled out for several reasons—one of which is, that it is not shown to have been, at any time, brought to the notice of the assured.

The present case presents strong claims to our consideration favorable to the assured. It is proved, and not denied, that in December, 1871, Young, the assured, notified Walker, the agent, from or through whom he had obtained the insurance, that he would pay no more premiums, and that he wanted a paid-up policy. Walker was still the agent of the defendant corporation. Instead of informing Young that his policy was non-participating, and hence, not of a class which authorized him to obtain a paid-up policy; and instead of informing him that he must make his application in writing, Mr. Walker, the agent, replied that it was all right, and he would attend to it. This was a month before any default in the non-payment of premium. Walker was frequently afterwards called on to know if the paid up policy had arrived, and at no time intimated a doubt of Young’s right to it. When he first communicated Young’s request to the insurance company in Virginia, is not shown. Nor, judging from the language of his letter, to be presently copied, does there appear to have been any answer received to his first communication. He writes as if he thought Young was entitled to a paid-up policy, and had no information that the right was denied. His letter to the president of the insurance company, dated May 6th, 1873, is as follows :

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"I again write you in reference to T. A. Brannon's policy, favour of Young & Woods. There were three payments of \$426 each, made upon that policy, making in the aggregate \$1,278. A paid up policy for that amount is wanted. Your immediate attention will oblige,

Very truly yours,

A. A. WALKER."

To this the president replied promptly, that the policy *ceased* for non-payment of premium in January, 1872.

We hold that the conduct of the agent in this case, and of the insurance company, estops the latter from denying that the demand of a paid-up policy was rightly made, even if such estoppel were necessary to protect his right, which we do not assert.

There is nothing in the objection that Young alone sues, based on the transfer made by Woods, his co-partner, without the approval of the company.—*Burnett v. Eufaula Home Ins. Co.* 46 Ala. 11; *McMasters v. Ins. Co.* 25 Wend. 379; *Pierce v. Washna Ins. Co.* 50 N. H. 297. If this objection were available at any time, it ceased at the death of Mr. Woods, before this suit was brought, which vested in Young, the surviving partner, the sole right to sue.

The measure of damages in this case, according to the proof, was the money value, at the time of the trial, of a paid-up policy of \$1,278, on the life of T. A. Brannon. The record contains no testimony or rulings of the court on that question, and hence, no question bearing on that, is presented for our consideration. The charges asked and not given assumed an enormous measure of damages, and were rightly refused. None of the charges asked should have been given.

The legislatures of most of the States have enacted statutes for the protection of policy-holders against insolvency and fraud of life insurance companies. As a condition of doing business, they are required to maintain a reserve of assets, sufficient in amount, at a rate of four to six *per cent.* interest, to cover their liabilities. The modern tendency is to increase the required reserve, to a standard of protection at a low rate of interest, say four and a half *per cent.*, and in some cases four *per cent.* There has been no legislation in Alabama on this subject; and we avail ourselves of this occasion to invite the attention of the legislature to it.

Another question for legislative inquiry. We have penal enactments which punish the offense of obtaining money under false pretenses with great severity. It is worthy of consideration if some amendment is not necessary, to embrace, restrain and punish reckless misrepresentations,

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too frequently indulged in by soliciting agents. Possibly present statutes would reach many cases; but it would be well that the statutes should denounce this crime against the public in no uncertain terms. And insurance companies will become much more circumspect in the selection of their agents, if they be held civilly accountable for all the representations and assurances held out by such agents in soliciting insurance.

Lest our language may be misunderstood, we feel it our duty to say we find no evidence of fraud or misrepresentation by the agent in this case; nor does the record furnish evidence of intentional wrong in the company.

We find no error in the record prejudicial to appellant, and the judgment of the Circuit Court is affirmed.

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Bill in Equity for the Appointment of a Receiver, and to Foreclose Deed of Trust.

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1. *Judicial notice of charters and powers of private corporations.*—Judicial notice can not be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter, i. e. a special act of incorporation. If it is shown, however, to have been incorporated under the general laws, which authorize the formation and define the powers of corporations, these are public laws, of which notice must be taken, and the power must be referred to such general laws.

2. *Railroad companies; power to borrow money and secure its payment.*—Corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power (at common law) to borrow money, and to make bills, bonds or promissory notes for its repayment, and may mortgage its real and personal property to secure debts thus created.

3. *State endorsement under Acts 1869-70, creating paramount lien; when railroad company may create subordinate lien.*—The internal improvement law, (Acts of 1869-70, p. 70,) while providing that the State shall have a first and permanent lien for its protection, when it has endorsed bonds under that act, does not forbid the railroad corporations from creating other liens on the property subordinate to such lien of the State; especially a lien to secure the bonds endorsed, &c.

4. *Remedy by statute is given the State alone; when can not be set up by purchasers of railroad.*—The remedies afforded by the statute are given to, and enforceable by the State alone; they can not be set up by the purchasers of the road, in a contest between them and the holders of endorsed bonds, secured also by the corporation's mortgage, to defeat the latter in foreclosing such mortgage, whatever might be their effect if the State were a party, and the holders of endorsed bonds, secured also by the corporation's mortgage, should seek to set up rights under the mortgage to embarrass the State in pursuing its remedies.

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5. *Party having prior lien; what sufficient answer to objection that State is not made a party.*—The presence of a prior mortgagee, or a party having a prior lien, who is not subject to the jurisdiction of the court, and the validity of whose incumbrance is not disputed, may be dispensed with; and where such prior incumbrancer is a State which can not be made a party, this is a sufficient answer to the objection that it is not made a party to a suit asserting no adverse claims to the rights of the State.

6. *Resolution of directors, authorizing bonds to raise money; when includes earnings, profits, &c.*—Where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, road-bed, etc., “and on all the real and personal property now and hereafter belonging to the company,”—this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, &c.

7. *Receiver of railroad; appointment of; court of equity acts with caution; case demanding such appointment; effect of.*—Where the appointment of a receiver is asked to displace the exercise of corporate authority over a railroad, courts of equity act with extreme caution, and require a clear case of right, and of pressing necessity to induce their interference; but when the corporation itself has been declared bankrupt, with interest having accumulated on its bonds exceeding the value of the property mortgaged to secure them, and purchasers of the equity of redemption at the assignees sale are in possession of the road and property mortgaged, receiving the incomes, profits and earnings of the road (which the mortgagee is entitled to take), and using the property for their own exclusive use and benefit, a clear case is presented for the appointment of a receiver; and such appointment would not be an interference with the corporate power and authority over the road, or a disturbance of corporate possession, but merely of that of the purchasers, who are using it for their own exclusive benefit.

8. *Void endorsement by State; liability of railroad company, on bonds.* Although railroad bonds be endorsed in contravention and fraud of the internal improvement law, and the endorsement be therefore void, this will not release the corporation of its liability for such bonds, which the corporation has secured by a deed of trust upon its property.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. N. S. GRAHAM.

Bill was filed by appellees, William H. Barnes and Henry Clews, as trustees of the East Alabama & Cincinnati Railroad Company, against appellants, Richard H. Kelly and others, praying the appointment of a receiver to take possession of the railroad property, and manage the same, and seeking a foreclosure of a deed of trust, the execution of which will appear from the averments of the bill.

The bill alleges, 1st, that the said company, “a corporation created and existing under and by virtue of the laws of the State of Alabama,” did cause to be executed, its first mortgage gold bonds, bearing date July 1, 1870, for one thousand dollars each, payable to bearer on the first of July, 1890, in American gold coin, at the banking-house of Henry Clews & Co., in the city of New York, with interest free from United States Government tax, at the rate of eight per cent. per annum, payable semi-annually on the first day of January and July of each year, on the presentation of the coupons annexed, as they become due—the same being 3,500 bonds,

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numbered from one to 3,500 inclusive, issued in accordance with and upon the conditions prescribed by the laws of the State of Alabama, and being endorsed by the State of Alabama; 2d, that said company, for the purpose of facilitating the negotiation and sale of said bonds, did, on the first of July, 1870, execute a mortgage deed to complainants, as trustees, for the purposes mentioned in said trust or mortgage deed, (viz., to secure the payment of the principal and interest of the first mortgage bonds, issued by the company and endorsed by the State, and the payment of the bonds of said company, not endorsed by the State, to the amount of \$705,000), whereby said company conveyed to complainants its entire road, equipments, real and personal property, then or thereafter belonging to said company, its franchises, &c., "together with the tolls, freights, rents, issues, incomes, earnings and profits thereof," &c., in trust for the equal benefit and security of all the persons and bodies corporate, who had been or might become holders of said bonds; 3d, that the fifth provision of said mortgage deed provides that it shall be the duty of said trustees or their successors, to exercise the powers granted them by the third and fourth sections of said deed, or to take other appropriate proceeding for the enforcement of the rights of the bondholders, upon the requisition in writing of the holders of two hundred thousand dollars in amount of said bonds, and, upon such requisition being made, the said trustees, at the time being, shall proceed at once to enforce such rights as hereinbefore provided, or by judicial proceeding or otherwise, as they, under the advice of counsel, shall deem most conducive to the interest of all the bondholders—their expenses, compensation, &c., to be deducted and paid from the income or the proceeds of sale of the railroad and property conveyed by the said mortgage—and that the third and fourth provisions of said mortgage provides that these proceedings shall be taken whenever the said company defaults in payment of the interest on the bonds for six months; 4th, that said company was petitioned into bankruptcy and received its discharge in 1873, and that said company has held no meetings of its directors since then, and is now to all intents and purposes dissolved, there being no organization of the same; that Samuel G. Jones, and John F. Bailey, were appointed assignees, and, by virtue of an order of the United States District Court, sitting at Montgomery, they sold and conveyed by deed, to James J. Colt, Richard H. Kelly, Bartholomew Boyle, and Virgil S. Murphey, purchasers thereof, all the right, title and interest of said company as hereinbefore stated, including its franchise, rolling-stock, lands, fixtures,

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and all its real and personal property; that said sale was duly confirmed by the said court, sitting as a court of bankruptcy, on the thirtieth of April, 1874, and by order of said court said deed was executed to the purchasers on the fourteenth of May, 1874; that said deed was made, as stated by the deed itself, under the express reservation of the lien of the trust deed to complainants; 5th, that at the time of said sale the property consisted (besides its corporate rights and franchises, and road-beds, and right of way extending two hundred and twenty miles, from Eufaula, Alabama, to Guntersville, Alabama; of twenty miles of completed railroad—about three miles in the county of Lee and the balance in Chambers county; that said twenty miles is laid with ties and rails, and is now being run and operated upon by said purchasers; also about five miles of completed road on the same line in the county of Etowah; that said purchasers have property on hand purchased with the income of said road, and also a large amount of freights, tolls and profits, subject to the lien of said deed of trust; 6th, that the interest on said bonds has been in default for more than four years, and is still unpaid; and this bill is exhibited upon the authority and written request of the holders of more than two hundred thousand dollars in amount of said bonds; that none of the proceeds of said road have been applied to the payment of said interest; that the entire real and personal property is insufficient to discharge even the accrued interest on said bonds; that although the said purchasers have had the full use and possession of said property since May 14, 1874,—more than three years—they have consumed and applied all the net proceeds of the said road to purposes other than the payment of the accrued interest due on said bonds, and they have failed entirely to extend said road; that if they have had no net earnings from the operations of said road, then they have so carelessly, recklessly and badly operated the same, that it has been of great and serious damage and injury to the bondholders of said company; that the property itself being insufficient to pay said interest, it is necessary that the income, tolls, profits and freights, be held and deposited for such payment; that at the present time these proceeds, profits, &c., are being so applied as not to be legally applicable to the reduction of the said incumbrance; that the amount of said bonds is seven hundred and five thousand dollars, upon which none of the accrued interest has been paid; that the present value of said property is less than one hundred thousand dollars; that it is highly necessary that said property be preserved pending this proceeding, and that the money, income, freights, &c., be held

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and deposited to satisfy the interest and principal of said bonds; that the said deed of trust creates a lien for that purpose, and authorizes complainants to receive and take the same, either personally or through their agents, managers or receivers, and apply the same to the payment of the costs of these proceedings, and the balance to the extinguishment of the said interest and principal, as far as they will go; 7th, that said purchasers have been operating said road since their purchase, using the same corporate name, to-wit: *The East Alabama and Cincinnati Railroad Company*. The bill then prays for a receiver, and a foreclosure of said deed of trust.

Motion to have a receiver appointed was made after due notice.

Respondents (appellants) filed their answer in substance as follows: 1st, they admit the several allegations of the first paragraph of the bill, except they "deny that any of said bonds were ever issued by said corporation according to, and in pursuance of, said act of February 21, 1870; 2d, that it appears from the face of said trust deed that its sole scope and purpose was to secure the payment of said gold bonds, with the interest thereon, free of Government tax, and which were to be issued only under such conditions and restrictions; 3d, they deny that the owners of two hundred thousand dollars, of said bonds, have, in writing, requested said trustees to commence this suit, and they plead the want of such requisition in writing in statement of this bill; 4th, they admit the allegations of the fourth paragraph of the bill; 5th, they admit the allegations of the fifth paragraph of the bill, except they deny having on hand any tolls, freights and incomes, at the present time, subject to the liens of said trust deed; 6th, they admit the allegations of the sixth paragraph of the bill, except they deny that they have carelessly or badly operated said road to the damage or injury of the bondholders; and they say that they have expended the earnings of the road, after deducting current expenses on repairs and permanent improvements; and they now explicitly deny that the original bill was filed upon the written requisition of the *bona fide* holders of said bonds, negotiated under the restrictions and conditions of said deed; and they deny that any of said bonds were ever negotiated or sold according to the provisions of said act of twenty-first February, 1870; 7th, they admit the allegations of the seventh paragraph of the bill; 8th, for further answer, respondents say that two hundred and fifty of the bonds purporting to be endorsed by the State were hypothecated, &c.; . . . 12th, that the whole four hundred of the bonds

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purporting to be endorsed by the State, were wrongfully and fraudulently, and without authority, endorsed by the Governor of the State, and were had and obtained by the present holders thereof, in fraud of the law, which authorized an endorsement to be made, and with full knowledge of the facts which invalidated their issue; 13th, that if said four hundred bonds are not fraudulent and void in the hands of the present holders, or if the fraudulency and nullity of said bonds can not avail these respondents, as a full defense to the bill, then that under and by the statute of the State authorizing the endorsement, the lien of the State was created and exists, and that the same statute which created the lien prescribed the remedy for a default, in payment of interest on the endorsed bonds, and they say that the remedy so prescribed is exclusive of any action in behalf of the holders of such endorsed bonds against the property of said company for such default, "and these respondents plead said statute as a bar to the bill," &c.; . 15th, and they submit that the said endorsed bonds, not having been legally negotiated by said company, the title thereto passed to the purchasers at the said bankrupt sale; . . 17th, they submit that the State is a necessary party to the bill, because as they say, it affects the rights and liabilities of the State, and as the State can not be made a party defendant, they plead these facts in bar to this suit, and as the State is not a party complainant, they plead the non-joinder in abatement.

Defendants demurred to the bill, and, for cause, assign: 1st, that it appears by the bill, that the bonds of the East Alabama and Cincinnati Railroad Company were endorsed by the State of Alabama, to the amount of four hundred thousand dollars; that the said corporation became bankrupt; that its franchise, and the whole of its property, was sold and conveyed to purchasers under the orders of the United States District Court, sitting in bankruptcy; that the franchise and property, so sold and conveyed, are of less value than one hundred thousand dollars, and wholly insufficient to satisfy the lien of the State for accrued and unpaid interest upon said endorsed bonds; that the lien of the State was created and exists by virtue of the act of the general assembly of Alabama; that the lien of the State is exclusive; that the statute which enacted the lien prescribed the remedy for a default in payment of interest by said company, and that said remedy is exclusive of all other remedies for such default, against the property and franchise in the hands of defendants as purchasers, subject to the lien of the State; 2d, that the act of the general assembly, under which the bonds of the company were endorsed by the State,

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declares what shall be done in case of default in the interest, and excludes any action by the endorsed bondholders, or in their behalf, except the remedy against the auditor for failure to prove his warrant on the treasury for the sum necessary to meet the interest on any bonds endorsed by the State, whenever said interest is not provided for by the company, and to pay such interest when due; 3d, that the statute, under which the bonds of the company were endorsed by the State, annulled all liens in favor of bondholders, created after the twenty-first February, 1870, as to any and all such bonds endorsed by the State of Alabama, and the State took the exclusive lien for the payment of interest upon such bonds by the company, and the exclusive remedy against the company for any default in payment of such interest; 4th, that the State put itself by the statute between said company and the bondholders; made itself liable for the company's default, in providing for the payment of interest, requiring the auditors, in such case, to draw their warrant upon the treasury, and to pay such interest when due; and it provided a remedy against said company for such default, and that remedy excluded all other remedies against said company or its property; and that exclusive remedy is now in the State, and this bill can not therefore be maintained for default in payment of interest on such endorsed bonds; 5th, that the complainants have no lien for unpaid interest; 6th, that the State is not a party to this suit; 7th, that by the endorsement of the bonds by the State, and the negotiation of them as such endorsed bonds, the provisions of the act of twenty-first February, 1870, under which the endorsement was made, became the terms of the contract between the parties, and no remedy for default in payment of interest by the company can be had against the said railroad company or its property, except that remedy which is provided in the statute; 8th, that the complainants are not trustees for the State of the lien which the State has for the payment of the principal and interest of the unendorsed bonds."

The cause came up before the chancellor, at chambers, on the motion of complainants to have a receiver appointed to take charge of the property, and on the demurrers of respondents, and on the motion to dismiss the bill for want of equity. Upon hearing of the same the demurrers and motion were overruled, and the register was ordered to ascertain a suitable person to be appointed receiver. The register in due time certified that one R. J. Thornton was a suitable person for such appointment, and, on the fourteenth of

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December, 1877, said Thornton was so appointed, and gave his proper bond therefor.

Respondents now assign for grounds of error: First, overruling the motion to dismiss for want of equity; second, overruling each of the several grounds of demurrer; third, in appointing a receiver.

WADE KEYES and VIRGIL S. MURPHEY, for appellants.

W. H. BARNES & SON, *contra*.

No briefs came to Reporter.

BRICKELL, C. J.—1. The bill does not aver the manner or the time of the creation of the East Alabama and Cincinnati Railroad Company, as a body corporate; nor is it shown whether it derived existence and authority from a special act of incorporation, prior to the constitution of 1868, or whether it was formed under the general laws of the State. Nor is there any averment of its specific corporate powers. The averment is general, that on the first day of July, 1870, when the bonds were issued, and the deed of trust for their security executed, it was a body corporate, existing under the laws of the State, and created for the purposes of constructing and operating a railroad from Eufaula to Gunter-ville. Judicial notice cannot be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter, by which we intend a special act of incorporation.—*City Council of Montgomery v. M. & W. Plank Road Co.* 31 Ala. 76. If it is shown to have been formed under the general laws, which authorize the formation, and define the powers of corporations, these are public laws, of which notice must be taken, and of course to these the power of the corporation must be referred.

2. There are, however, powers at common law incident to corporations, and these they must be presumed to possess, in the absence of special restraint by their charters, or by statute. Of these, is the capacity to purchase alien lands and chattels. "Independent of positive law, all corporations have the absolute *jus disponendi* of lands and chattels, neither limited as to objects nor circumscribed as to quantity. They may execute a mortgage to secure a debt."—2 Kent, 281, (marg.); Green's Brice's *Ultra Vires*, 123-130. Corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power to borrow money, and to make bonds, bills, or promissory notes, for its repayment; and also power to mortgage its property, real or

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personal, as a security for such evidence of debt. These are powers necessary and proper to enable it to accomplish the purposes of its creation, and are regarded as incidental or implied, though not expressly conferred by the charter, or act of incorporation.—*Richards v. Railroad*, 44 N. H. 127; *Commonwealth v. Smith*, 10 Allen, 448. In the consideration of the demurrer, and the motion to dismiss the bill for want of equity, notwithstanding the powers conferred on the corporation are not stated specifically, the objects of its incorporation being shown, it must be presumed it had the incidental powers, conferred by the common law, unless these are restrained, or taken away by statute. If it has these powers, the bonds and deed of trust, which is in its legal effect a mortgage, are not *ultra vires*, but subsisting debts, and a valid security.

3. It is expressly recited in the deed of trust, that the bonds were prepared with the view of obtaining the indorsement of the State, under the act of February 21st, 1870; and that the lien it creates shall be subordinate to the lien the State would under that act acquire by the endorsement. The proposition, which seems to be the foundation of the motion to dismiss, and several of the causes of demurrer, specially assigned, is, that the act forbids the creation of a lien by mortgage or otherwise, in favor of the bondholders, to co-exist with the lien of the State, and thus restrains or abrogates the power the corporation would otherwise have to execute a mortgage, or assignment as a security for the payment of the bonds. The statute, (Pamph. Acts 1869-70, p. 149), certainly intends, that when the State, by an indorsement of the bonds of a railroad company, incurred liability for the principal and interest of such bonds, the act of indorsement should operate a lien in favor of the State, having priority of all other liens, though it was not declared by deed or other writing. It also provides remedies which may be pursued for the protection of the State, in the event the company should make default in the payment of principal or interest. But we cannot discover anything in its terms or spirit, leading to the conclusion that a prohibition of corporate power to mortgage, in subordination to the lien of the State, was intended. On the contrary, it seems clear no such prohibition was contemplated. The bonds the governor is empowered to endorse, are the *first mortgage bonds* of the company, implying they are, or may be, secured by mortgage. Again, it is said the indorsement of the State shall constitute a *first lien, without a deed from the company*; and the only prohibition imposed, is not against the creation of any other lien or mortgage, than that the statute creates

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in favor of the State ; but the creation of any other, which would have priority over, or come in conflict with that of the State. The contract and liability of the State, created by the indorsement, is that of suretyship for the railroad company, indemnity and protection against the liability the statute intends to afford. This is its whole scope and operation. A principal debtor may well, and it is not of infrequent occurrence that he does, create a security and indemnity for his surety, and at the same time create a security by another instrument, or in another mode, for the protection of the common creditor. Each is at last, unless narrowed and limited by its express terms, a security for the debt, and may enure to the benefit of the surety, or of the creditor. A court of equity, will so enforce and appropriate them that the debt shall be paid. The payment of the debt is the purpose for which they are created, and that being accomplished, ease is given to the surety, while the legal and equitable claims of the creditor are satisfied. It is not a lien or a security for the default of the State the deed of trust affords ; but a lien or security for the default of the corporation, the principal debtor, which alone can involve the State in loss.

4. The remedies the statute affords, are intended for the protection of the State ; and it may be, if it was pursuing these remedies, that it could not be embarrassed by the interference of the trustees to foreclose the deed of trust ; or such interference might be an election, by the bondholders authorizing it in that case, to rely on the deed of trust, in preference to a reliance on the liability of the State as endorser. But the State is not pursuing the statutory remedies it could have pursued, nor does it intervene to stay, or claim protection against the foreclosure of the deed of trust ; and it is not for the corporation, or those who have succeeded to its place merely, to assert the rights of the State, to the delay of a common creditor, pursuing a clear, equitable remedy to which he is entitled. Statutes are construed in reference to the common law, and the presumption is, that no other innovations on common law principles, than such as are clearly expressed, are intended.—1 Kent, 464 ; 9 Bac. Ab. 244. No principle of construction will lead to the conclusion that the statute we are considering derogates from the common law power of the corporation to mortgage, or to assign, for the security of the bondholders. Restraint of such power is not essential to the protection of the State, except so far as the statute in express terms restrains it—the prohibition of the creation of any lien having priority over or coming in conflict with that of the State. The creation of another lien, sub-

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ordinate to it, for the security of the common debt, which, if enforced, is in relief of the State, is not inconsistent with, or in conflict with the lien of the State. Attempts to employ it so as to embarrass the State would, if necessary, be restrained; or it may be, would operate to discharge the State from liability. These are considerations which are not involved in the inquiry, as to the power of the corporation to create the lien, but which arise after its creation, and its enforcement is sought. The remedies the statute affords are given to the State, and the State alone can pursue them. They cannot be resorted to by the bondholder, or by trustees, or assignees for his security, and cannot exclude the right he or they have at common law, or in equity, not derived from statute, to foreclose the deed of trust. If the statute had extended to the bondholders, or to trustees, or assignees, for their security the remedies it provides, without a negative, express or implied, of the right to the equitable remedy, the statutory remedies would have been regarded as cumulative, and it would have been matter of election with them to pursue the one or the other.—Sedgwick on Stat. & Con. Law, 342.

5. The State cannot be made a party defendant to an action at law, or a suit in equity, and this is a sufficient answer to the objection because of the omission to make it a party.—Constitution of 1875, art. 1, sec. 15. The presence of a prior mortgagee, or of a party having a prior lien, who is not subject to the jurisdiction of the court, when the validity of his incumbrance is not disputed, may be dispensed with; and in the present case must be dispensed with of necessity.—*Hogan v. Walker*, 14 How. 37. The demurrer and the motion to dismiss, were properly overruled.

6. The resolution of the board of directors, under which the deed was executed, does not, in express words, authorize the creation of a lien upon the incomes, profits, or earnings of the road. It does, however, authorize its creation on "all the real and personal property now, or hereafter, belonging to the company." The earnings, incomes and profits of a railroad, derived from its management and operation, are personal property. Words broader or more comprehensive, embracing all existing, or future acquired personal property, could not have well been used. It is but giving these words their natural effect, to construe them as embracing the earnings and profits of the railroad. So construing them, the deed of trust in the creation of a specific lien on the earnings and profits, was not in excess of the authority conferred by the resolution. The trustees do not stand as mortgagees who have neglected to take a pledge of, or a specific lien on

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rents and profits. They have a lien on the incomes, profits, and earnings of the road co-extensive with that on the road, and the other property of the company embraced in the deed; the right to take and appropriate them to the payment of the mortgage debt, so far as it is past due and unpaid.

7-8. The bankruptcy, and a practical dissolution of the corporation, the execution of the deed of trust, the negotiation of the bonds, the accumulation of unpaid interest to an amount exceeding the value of the property conveyed by the deed, the sale by the assignees in bankruptcy, of the equity of redemption of the corporation, the possession and protection of the incomes, profits, and earnings of the road so far as completed, and the use of its rolling stock, and other personal property, by the purchasers for their exclusive benefit, are facts not controverted. The validity of the bonds is disputed by the answer, and it is averred that they were obtained by the present holders in contravention, and in fraud of the act of February 21st, 1870. If this be true it may avoid the indorsement of the State, but it does not relieve the corporation from its primary liability as principal debtor. The case thus presented is a plain one for a claim to a receiver. The general rule in equity is, that if a railway corporation becomes insolvent, makes default in the payment of the principal or interest of its bonds secured by mortgage, and the mortgage property is an inadequate security, a receiver will be appointed, on a bill for foreclosure. Especially will the court commit the encumbered property to the custody of a receiver, if, in addition to the insolvency of the corporation, and the inadequacy of the security, the only fund for the payment of the debt is the earnings of the road, and these are being misapplied.—High on Receivers, §§ 376-390. Courts of equity are very reluctant to appoint receivers over any and all corporations. In *Adley v. Whistable Company*, 17 Vesey, 324, (marg.) Lord ELDON, speaking on this subject, said: "I do not conceive it to be impossible to lay hold of their property, and with regard to the power of the court there is no distinction, whether the subject is a fishery or an inheritance of another nature. The court must deal with it as well as they can, to prevent a failure of justice altogether; and if, by resisting the demands of justice they expose their property to ruin, the mischievous consequences must be attributed to themselves." And further speaking of the necessity which might rest upon the court of carrying on the business of the corporation, he said: "Yet that difficulty would not prevent the decree, though it might induce the court to modify it, so as to do as little

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injury as possible." The subjection of corporate property and franchises to the custody of a receiver, is a suspension in a greater or less degree of the powers of the corporation, in addition to devolving on the court often the continuance of the business of the corporation, and this is the explanation of the greater reluctance to appoint receivers over them and their property, than in the case of individuals. Railway companies are more than mere private corporations—they are in many respects, and for many purposes *quasi* public bodies, invested with large and peculiar franchises and privileges, and owing important duties, and under varied responsibilities to the public. Hence, courts of equity in the appointment of receivers over them act with extreme caution, and require a clear case of right and of pressing necessity to induce their interference.—*Meyer v. Johnston*, 53 Ala. 237. The present is not properly the case of a claim of a receiver, who is to interfere with the exercise of corporate power, and whose custody will suspend in any degree corporate functions. The corporation is practically dissolved, a bankrupt, and for more than three years has had no organization, and there has been an entire non-user of its powers and franchises. Its property has passed into the possession of the defendants, who are using it for their exclusive benefit. Their possession and use of the property will alone be disturbed by the appointment of a receiver. The propriety of the appointment must depend upon the principles governing applications for receivers in the aid of foreclosure of mortgages. The insolvency of the mortgagor, the inadequacy of the mortgage security, and the inability of the mortgagee to enter and take possession, the mortgage debt being unpaid in whole, or in part, and there being a specific lien on the incomes, rents and profits, it cannot be doubted, as a general rule, require the court to appoint a receiver.

Affirmed.

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Perry Insurance and Trust Company v. Foster.

*Bill in Equity by Creditor to have a Conveyance declared a
General Assignment, or set aside on the ground of Fraud.*

1. *Assignments for the security of creditors; Code construed.*—The Code declares that all assignments, or other conveyances stipulating for the release of the debtor, fraudulent and void as to creditors of the grantor; general assignments are not prohibited, but preferences created by them are annulled, and they are converted into a security for the equal benefit of all creditors. With these exceptions, the Code wrought no changes in the principles settled by judicial decisions touching assignments, or other conveyances for the security of creditors. It has not entirely destroyed the right of an insolvent debtor to prefer one creditor to another.

2. *Same; when not declared fraudulent; provision as to sale.*—An assignment conveying a plantation, and crops thereon, requiring trustees to take possession and sell, will not be declared fraudulent, because it does not provide for the immediate sale of property conveyed. The sale must be made in a reasonable time, and the reasonableness for any delay for which the assignment provides, must depend on the character of the property, the cause of delay, and the circumstances of the particular case.

3. *Same; what not an unreasonable stipulation.*—Where, in the spring of the year, an assignment is made of a plantation, and the personal property used in cultivating crops upon it,—at which season it could not be easily rented, and it would be sacrificed by a sale, and necessarily abandoned if stripped of the personal property—it is not unreasonable to stipulate that a sale shall be delayed until the first day of December following; and, in the meantime, that the property shall remain in the possession of the grantors, to be used in making the crops which are to be delivered to the grantees as soon as gathered, and applied to the payment of the secured debts.

4. *Transfer constituting general assignment under our statutes.*—A transfer, without regard to its former conveyance, by the voluntary act of an insolvent or failing debtor, of substantially all of his estate subject to execution, for the security of one or more creditors in preference to the others, is, under our statutes, a general assignment which enures to the equal benefit of all creditors. To come within the influence of the statute, the disposition of substantially all of the debtor's estate to one or more creditors, in preference to the others, must be by volition or act of the debtor; the statute has no reference to preference or liens arising by operation of law.

5. *What will vitiate an assignment; and what not.*—The wilful, deliberate introduction of fictitious debts, or the intentional exaggeration of the amount of real debts, in which debtor and creditor participate, is feigning a consideration, and is a fraud which will vitiate an assignment; but error in the description of debts, or the introduction of fictitious debts, to which the creditor is not privy, will not vitiate an assignment; nor will an assignment be vitiated merely because the creditor has other security for any one or more of the debts, which security is not stated in the assignment.

6. *Same; what not a simulation or exaggeration of debts which will vitiate a conveyance.*—When a creditor takes from his debtor a conveyance to secure his acceptances of the debtor's bill of exchange, as well as other debts, and at the same time receives a transfer from third persons of judgments in their favor against the debtor, for a like amount, which was purchased with the bill, and

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such is not expressly mentioned in the conveyance, it is neither a simulation nor exaggeration of debts which will vitiate the conveyance. The conveyance does not secure the judgment, and the debt, evidenced by the bill of exchange, is still an outstanding liability, unless the acceptor and debtor intended the transfer of the judgment to operate as payment of it, and this presumption is repelled when it is expressly stipulated in the conveyance that it shall not operate to impair the right of the holder or transferee of any judgment against the debtor, to enforce it at pleasure.

7. *Conveyance in this case held valid*—The conveyance, under the facts set out in this case, was valid, and could neither be set aside as fraudulent, nor declared a general assignment.

APPEAL from Chancery Court of Perry.

Heard before the Hon. CHARLES TURNER.

On the 2d of August, 1869, the appellee, Robert Foster, filed his bill in this cause, in the chancery court of Perry county, to have set aside a deed of trust executed by R. H. Lee, Jas. Lee, W. R. Brown, Jno. H. Lee, and the Perry Insurance and Trust Company, appellees. The material facts of the case, about which there is little or no dispute, are these: On the 19th day of February, 1869, Richard H. Lee and James Lee, were largely engaged in planting in Perry county, being the owners of three well stocked plantations. On each of these places they had a force organized and at work in the making of a crop of corn and cotton. They had been engaged in the business for many years, and were considered skilled in the same. They were at this time insolvent, and, without aid from some source, could no longer carry on their business. Executions, to the amount of \$25,000, against them were already in the hands of the sheriff. Other suits were pending, and other debts were maturing. Geo. W. Tate, and the firm of Butt & Foster, held the oldest executions, amounting to some \$20,000, which the sheriff was about to levy. A sale at that time would have broken up their planting operations for that year, and the property, though intrinsically more valuable, if then sold would have realized little, if anything, more than the amount of the judgments.

Richard H. Lee and James Lee were stockholders in the Perry Insurance and Trust Company to the amount of \$5,000 each; they were indebted to the company to the amount of about \$36,000, upon which, a brother, John H. Lee, was liable as endorser for them. Richard H. Lee, the active partner, realizing the situation, sought some creditor who could, and would assist him in protecting the property from sale, and enable him to make another crop, which, proving to be a large one, at the prices then prevailing, would go far towards paying up their indebtedness. He at last made the following arrangement with the Perry Insurance and Trust Company:

The company agreed to accept their bills, due the first and

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fourth of the following January, to the amount of the Tate, and Butt & Foster executions, and to advance them a sum, not exceeding \$5,000, with which to make a crop, and the Lees, upon their part, agreeing to convey to trustees in trust for the security of said company, the Prairie plantation, upon which James then resided, the stock, corn, fodder and farming implements upon the plantations owned by them, and the crops to be raised that year by them on said plantations. Upon negotiations with Tate, and Butt & Foster, the principle execution creditors, they agreed to receive the acceptances of the company and transfer their judgments; this was done, and the deed of trust was thereupon executed to secure, therein recited, five bills of exchange aggregating over \$36,000, the advances to be made not exceeding \$5,000, and the bills of exchange drawn on said company and accepted by it, and payable to Geo. W. Tate and Butt & Foster—the said deed being, as expressed therein, upon the following conditions, viz: The said R. H. Lee and James Lee shall well and truly cultivate said plantations and raise crops of corn and cotton thereon this year, and gather and prepare the same for market as early as practicable, and deliver the same to the said trustees; and the said trustees shall take possession of the said corn and cotton and sell the same in the customary manner for cash, at such time or times, and at such place or places, as by them may be deemed more advantageous to the Perry Insurance and Trust Company; and shall, on or before the first Day of December next, take possession of and sell all of the aforegranted real estate and all the other personal property aforesaid, or so much thereof as may be deemed necessary to satisfy the said debts and interest and damages which have accrued, or may accrue thereon, and all expenses touching the preparation of these presents and the execution of these trusts, and shall apply the proceeds, &c. . . . It is further stipulated, that the trustees shall give thirty days notice of the time and place of the sale of the real estate and of the personal property now in existence. It is further stipulated and agreed that the trustees shall be and they are hereby authorized to take possession of all the aforegranted property, whenever they shall deem it necessary to carry into effect the purposes for which this deed was made, or whenever the said Perry Insurance and Trust Company shall so direct. It is further stipulated and agreed that these presents shall not in any manner interfere with or impair the lien of any judgments recovered against said James Lee and Richard Lee, or either of them, in favor of G. W. Tate, and Butt & Foster, or either of them, and shall not, in any manner, interfere with or im-

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pair the lien of any executions issued upon said judgments, or with the right of the plaintiffs in said judgments, or their assignees, to cause any or all of said real or personal property to be sold at any time for the satisfaction thereof; but the said judgments shall remain in full force and effect, to all intents and purposes. Should any money remain out of the proceeds of said property, after the payment of the aforesaid debts, fees, and expenses, the same shall be paid over to the said R. H. and James Lee. These the company afterwards purchased.

Upon all these several judgments executions were kept alive and in the hands of the sheriff, and on the second day of August, 1869, the lands were sold by the sheriff under said executions, and John H. Lee became the purchaser at the sum of \$25,160, for which sum the company gave R. H. and James Lee credit on their indebtedness. In payment of this bid, the company accepted the note of John H. Lee, secured by a mortgage upon the property purchased, and his individual plantation. This note still remains unpaid and the mortgage unenclosed; no interest having been paid thereon since January, 1873. On the 8th of March, 1870, the personal property conveyed by the trust deed was sold at private sale to John H. Lee, who had previously resigned his trusteeship, for \$13,231.50 in cash, and that amount was credited upon the account of R. H. and Jas. Lee. The crop was in part a failure; 195 bales of cotton were made and were turned over to the insurance company. The company, with the consent of the Lees, held this cotton for a better price for about a year, and then sold it at a price less than could have been realized when they received it. The net proceeds, \$10,814.25, were then placed to the credit of the Lees. Since his purchase, John H. Lee sold the Holmes place for \$12,000, one-half cash, and has farmed on the other places—R. H. Lee superintending the Muckle place, and Jas. Lee continuing to reside upon and farm the Prairie place.

The complainant, who is a creditor of R. H. and James Lee, attacks this transaction as intended to hinder, delay and defraud creditors.

The chancellor decreed the trust deed to Wilson R. Brown and John H. Lee fraudulent and void as to the creditors of Richard H. and James Lee, and that the Insurance and Trust Company be required to account for the property received by it under such deed. The rulings and decree of the Chancellor are now assigned as error.

W. M. BROOKS, and JOHN F. VARY, for appellants.—1. A judgment is not an assignment or transfer of the debtor's

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property in any sense. It is a debt of record recovered by the plaintiff, not by the debtor, and usually against the debtor's will. And if he transfers, with or without the consent of the debtor, the transferee succeeds simply to the rights and obligations of the plaintiff, and becomes, in effect, not the assignee of the debtor's property, but the assignee of the property of the judgment creditor, with such liens and rights as the law gives him. Upon what show of reason or authority can it be held that the deed, in this case, when aided by the judgments—that which is not an assignment by the debtor—becomes, in effect, a general assignment. Taken together, the whole estate of the grantor is not thereby divested out of him, or transferred, or assigned by him to another. But every “divestiture” of a debtor's estate, though made by him, is not a “general assignment” within the meaning of the law. An absolute sale, by an insolvent debtor, of his entire estate, to a creditor, to pay a pre-existing debt, is not included within the meaning of the term “general assignment.”—*Young v. Dumas*, 39 Ala.; *Hoskins v. Bailly et al.*, 48 Ala. 377; *U. S. v. McLellan*, 3 Sum. 343; *Dias v. Brouchand*, 10 Paige, 445; *Norton v. Cobb et al.*, 20 Geo. 44. But there is another reason why the deed is not a general assignment: In order to procure this deed, the company paid the bills of exchange to Tate and Butt & Foster, and advanced a large amount of money to make a crop, and afterwards advanced more to pay the other executions. This constitutes the company a purchaser for valuable consideration, of all the property included in the deed of trust. The distinction between a mere assignment to pay pre-existing debts, and one to secure payment of money advanced and liabilities incurred to obtain the assignment, is too well supported by authority to be now questioned.

2. Thus it clearly appears that the deed is not a general assignment. But treating it as a conveyance of all the property of the grantors, it is not void for the reason assigned by the chancellor, namely: “for it is apparent that no substantial benefit is reserved to the grantors” From the provisions of the deed, and the authorities, the chancellor cannot be sustained. Similar deeds made by insolvent debtors conveying all their property, and providing for the raising of a crop, also included in the deed, have been upheld by this court again and again. And it has been uniformly held that by such deeds no illegal benefit is secured or reserved to the grantors.—*Ravasies v. Alston*, 5 Ala. 297; *Graham v. Lockhart*, 8 Ala. 9; *DuBose v. DuBose*, 7 Ala. 235; *Clark v. Bank*, 7 Ala. 765. See, also, *Abercrombie v. Bradford*, 16 Ala. 560; *Shackleford v. Bank*,

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22 Ala. 246; *Miller v. Stetson*, 32 Ala. 162; *Henderson v. Dill*, 11 Ala. 689.

3. The simple recital of the facts in this case, is a complete refutation of the charge that the deed was made "with intent to hinder, delay, or defraud creditors," or with any illegal intent whatever. (See statement of facts). But what is the "*hinderance and delay*," which the law denounces as fraudulent? Every transfer or conveyance of a debtor's property, whether all or a part, absolute or conditional, made to secure the payment of debts to one or more of his creditors to the exclusion of others, necessarily hinders or delays, or tends to hinder and delay the excluded creditors. But it is not every hindrance and delay that will render the deed void: "*Only such hindrance and delay as will operate as a fraud come within the operation of the statute.*"—Bump. on F. C. 67, and cases there cited; *Hoffman v. McCall*, 5 Ohio St. 124. The statute is aimed only at *intended fraud*: to pay, or secure the payment of a debt to one creditor, is no fraud upon others—*no legal injury*.—Bump. 218, 219, and notes; *Lee v. Flanagan*, 7 Ired. L. R. 474. See, also, 4 Bump. 220, *et seq.*, 357, 358, and notes; 3 B. Monroe, 556-9; *Ib.* 423; 5 *Ib.* 313; 39 Ala. 60; 5 Ohio, *supra*; 32 N. Y. 209; 29 Penn. 387; *Ala. Life Ins. Co. v. Petway*, 24 Ala. 566; *Pullman v. Newbury*, 41 Ala. 176.

4. The chancellor holds that the deed does not show the connection between the acceptances and judgments and the transfer of the latter to the company, and that in omitting to do so "*a material fact is concealed from the world*," with intent to wrong and defraud the other creditors of the grantors. This is visiting the bare omission of a fact, the disclosure of which could have been of no benefit to the creditors, and its concealment no injury, with unusual harshness and severity. By the well established rules of law, as well as the principles of common charity, "we are taught that fraud is not to be presumed when the circumstances relied on to sustain that allegation are fairly susceptible of an honest intent," and that "courts do not strain to force conclusions of fraud." 24 Ala. 566; 21 Ala. 136; 3 Ala. 352. The deed, in truth, discloses every material fact upon which it is based. In fact, there was no occasion to refer in the deed to the judgments at all. Upon reading the deed, it is obvious that there could be no intention to *conceal* the connection between the acceptances and the judgments.

5. The chancellor says that an effort is made to show that the Lees owed two debts: one indorsed by the judgments, and the other by the bills of exchange; when, in fact, there is but one debt, and the other is *simulated*. It is certain, how-

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ever, that the deed did not provide for a *simulated* debt. The bills were evidence of a real debt, and the company, by its accommodation and acceptance, had become bound for its payment; and the company, being so liable, had the right to take counter security. The security provided by the deed was insufficient, but the judgments were more efficient because they created a lien on all the property of the grantors. The imputation that the parties to the deed were endeavoring to produce the impression that there were two debts: one evidenced by the bills, and the other by the judgments, is unfounded. Its powers are to be executed, not to pay two debts due to Butt & Foster and Tate, but only to pay the one debt, evidenced by the bills. And the judgments are left to be enforced according to rules of law and the practice of courts. There could be no impropriety in failing to disclose, in the deed, that the grantors had given the company other securities for the same debt. "If the debt is imperfectly secured, it is not objectionable to provide for it in the assignment. *If it is amply secured, a provision for its payment will not render the assignment void.*"—See *Strong v. Skinner*, 4 Barb. 559; *Hastings v. Palmer*, 1 Clarke, 52; 35 Barb. 554; 38 N. Y. 293; Bump. on F. C. 388. And the omission in the assignment of any reference to the other securities "is not inconsistent with honesty and good faith."

6. The other points of the brief (which is very elaborate), go to the questions, "as to fraud in fact," "former adjudication," which need not be noted in addition to the portion of the brief already condensed. Several points of the decree of the chancellor are also commented upon.

ELMORE & GUNTER, and WATTS & SONS, with whom was POWHATTAN LOCKETT, *contra*.—1. It may be considered as clearly established that a debtor in failing circumstances, and actually insolvent, and known by the creditor to be so, cannot, under the guise of a mortgage or deed of trust, protect an estate for his own enjoyment, use, or benefit. In other words, when the debtor is insolvent, and known to be so by the creditor, no instrument of preference can be executed which does not "make a simple and *unconditional* appropriation of his property to the payment of his debts"—and any arrangement which continues his business for him by future advances, or otherwise reserves any use for the grantor, is fraudulent in law, irrespective of the actual intention of the parties with respect to other creditors.—*Constantine v. Twelve*, 29 Ala. 607; *Lukins v. Aird*, 6 Wall, 78; *Reynolds v. Welch*, 47 Ala. 203; *Reynolds v. Crook*, 31 Ala. 637; *Knight v. Wiley, Banks & Co.* 27 Ala. 347; *Kirksey v. Montgomery*,
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26 Ala. 172; *Grimshaw & Brown v. Walker*, 12 Ala. 102; 7 Paige Rep. 568; *Grover v. Wakeman*, 11 Wend. 187; *Nicholson v. Leavitt*, 2 Selden, 518-19; *Borland v. Walker*, 7 Ala. 269.

2. In reference to the simulation of debts, it is laid down as the law, "That where the deed describes debts not shown to be due *by the debtor*, the inference is proper that the deed was executed, not for the *bona fide* purpose of securing debts actually due, but that making use of that indebtedness and simulating it to be greatly more than it was, the chief intention was to hinder and delay creditors. And no rule is better established, or is more salutary in its effects, than that which declares it the imperative duty of the grantee in a deed attacked for fraud by creditors, to remove *any suspicion of unfairness from the transaction*.—*Marriott & Hardesty v. Givens*, 8 Ala. 712; *Hall, Moses & Roberts v. Heydon*, 41 Ala. 242. In such transactions parties are conclusively held to intend the natural and legitimate consequences of their act, no matter how loudly they may protest to the contrary.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 347; *Pope v. Wilson*, 7 Ala. 694; *Welch v. Reynolds*, 47 Ala. 203; 11 Wend. 225. The evidence clearly establishes a simulated debt in this case.

3. No one can certainly assert that the purpose of the deed was not, *in part at least*, to prevent an immediate application of the property of the debtors in favor of the creditors. Although a deed may be on a valuable consideration, if there is an actual intent to *hinder, or delay, or defraud*, other creditors, the existence of a valuable consideration is not sufficient to uphold the transaction.—See 41 Ala. 168, and authorities there cited; Kerr on Fraud and Mistake, 213; *Brigham v. Tillinghast*, 3 Kern. 215; *Welch v. Reynolds*, 47 Ala. 200. Let any one imagine a disconsolate creditor, seeking for something to make his money out of, coming across this instrument, would he not at once calculate the debts secured and provided for by the deed? and would he not see that the acceptances, amounting to over \$20,000, were saddled upon the property, and at the same time understand that the judgments for a like amount were to be paid out of the property? and would not such an array of debt, with the lien on the stock of the Lees kept in the dark, have a tendency to dishearten, to hinder and delay, any but the most venturesome? Did not "honest and fair dealing require the truth of the transaction to be disclosed on the face of the instrument?"—4 Denio, 224.

4. It has been universally held that the fact of future advances being secured by a deed, is alone sufficient to render it fraudulent and void when a knowledge of the insolvency

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is brought home to the creditor. In the case of *Barnum v. Hempstead*, 7 Paige, 570, Chancellor Walworth says: "The first objection which is made to the validity of the assignment in this case is, that it contains a provision to pay to Lay, one of the assignees, for his future advances to and future liabilities for the assignors, in preference to, or to the exclusion of the debts which are due to creditors whose debts had been contracted by the assignors previous to the assignment. If I was satisfied that such was the fair construction of the instrument, I should not hesitate for a moment to declare it fraudulent and void, upon that ground alone; as such an attempt to secure a future credit and benefit to the assignors, by means of the assigned property, to the prejudice of their present creditors, could not be sustained in any court."—30 N. Y. Rep. 211; 4 Denio, 217. See, also, 7 Paige, 37.

5. The transfer of the judgments and the execution of the deed of trust are parts of one transaction.—*Cummings & Cooper v. McCullough*, 5 Ala. 335; *Bancroft, Betts & Marshall v. Holt & Chambers*, 30 Ala. 193. And either being fraudulent, no protection can be claimed under them.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Wiley, Banks & Co. v. Boyd*, 38 Ala. 625; *Grover v. Wakeman*, 11 Wend. 187.

6. It may be pretended that an actual intent to defraud is necessary to make a conveyance fraudulent. It would be a useless provision of the law to afford a remedy only in cases where an actual intent had to be proved, since it usually must be proved, by the parties to the transaction. Is there a case known in which the parties confessed to a bad intent? The intent with which a thing is done must be shown by outward acts. Every person is presumed to have common and ordinary understanding, and is presumed to intend the natural consequence of his acts; and, therefore, when the inevitable result of a deed is to hinder and delay creditors, it is constructively fraudulent, no matter what the parties may say to the contrary. "The statute of frauds refers to a legal intent and not a moral intent; that is not a moral intent as contra-distinguished from a legal intent. If he do what is forbidden he will not be allowed to say that he did not intend to do a forbidden act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest which the law justly pronounces fraudulent and corrupt; but he is not, therefore, to escape from the consequences of it. The law must have a more certain standard for measuring men's intents, than each individual's varying notions of right and wrong."—*Welch v. Reynolds*, 47 Ala. 203; *Wiley, Banks & Co. v. Knight*, 27 Ala.; 11 Wend. 225; *Thomas v. Jenks*, 1 American Lead. Cases, 86, where all the authorities are collected.

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7. The question of fraud in the transaction, as well as the plea of estoppel, on account of certain alleged proceedings in the Circuit Court of Perry county, having been practically settled by the decree of the Chancellor, we will say nothing on these points save that section 1867 of the Rev. Code was only intended to destroy the right of preference in a general assignment free from objections in other respects. And that if the transaction is otherwise fraudulent, it is void, under § 1865 of the Rev. Code, as to the attacking creditors; and the beneficiary under such a deed cannot, after detection, set up that the deed is a general assignment and claim to share in the results. And to call attention again to the fact that the acceptances of the Insurance Company, which purchased the judgments, being given "at the request and for the accommodation of the said Lees," of necessity made the property in the bills in the Lees, and the judgments purchased with them the property of the judgment debtors, and, therefore, destroyed them as valid and subsisting debts against their estate.—*Stephens v. Sinclair*, 1 Hill, N. Y. 143; *McLemore v. Pinkston*, 31 Ala. 266; *Wallace v. Br. Bank*, 1 Ala. 565.

BRICKELL, C. J.—The assignments of error present several questions, on which we do not deem it necessary to express an opinion, as they do not affect the conclusions we have reached, and it is not probable they will arise again under similar complications. If these are conceded to the appellee, his right to any relief depends on the one or the other of two propositions, neither of which, in our judgment, can be maintained. The *first* of these is, that the conveyance executed on the 19th of February, 1869, by James and Richard H. Lee, is fraudulent and void as against their creditors. The *second* is, that if the conveyance is not fraudulent, taken in connection with the coterminous transfer to the preferred creditor, of judgments against the grantors, executions on which were a lien on all their estate, it is a general assignment, under the statute enuring to the equal benefit of all their creditors.

The conveyance is, doubtless, as decided by the chancellor, an assignment strictly and technically, as distinguished from a mortgage, or a deed of trust for the security of creditors, in the nature, and with the incidents of a mortgage. The entire estate in the property designated, legal and equitable, is conveyed to the trustees, and all that remains to the grantors is a resulting trust.—*Burrill on Assignments* (3d ed.), 11-16. It is also a fact, about which there is no controversy, that at the time of its execution, the debtors were actually

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insolvent, pressed by executions, under which, if forced sales had been made, their whole estate would have been sacrificed. From these they were anxious to obtain ease, and the opportunity to continue for the current year their planting operations, for which they had partially arranged. They were largely indebted to the Perry Insurance and Trust Company, and their brother, John H. Lee, was liable as accommodation endorser for this indebtedness. Sales of their property, under the executions, would have involved him in financial ruin, and the company probably in large loss. The company agreed to accept the bills of exchange of the debtors, having near twelve months to run, for a sum sufficient to cover the larger judgments, to pay the smaller judgments, taking a transfer of them, and reserving the right to issue execution for their collection, whenever they deemed it necessary, and to advance a sum not exceeding \$5,000 for the cultivation of crops on the lands assigned and other lands of the debtors; the debtors to cultivate the crops, to gather and prepare the same for market, and to deliver the same without delay to the trustees. The agreement is substantially embodied in the assignment. The crops, as well as the property in existence, by the terms of the assignment, are appropriated to the payment of the enumerated debts, which include the acceptances given for the judgments, and the prior indebtedness. The trustees are authorized to take possession whenever they deem it necessary, or the company shall direct, and must take possession on the ensuing first of December, and sell so much of the property as is necessary for the payment of the expenses attending the execution of the trusts, the attorney's fees for preparing the conveyance, and the secured debts. If a surplus of the proceeds of sale remain, it is payable to the debtors.

In view of the insolvency of the debtors, it is insisted the assignment is fraudulent—that it is not an absolute, unconditional appropriation of the property conveyed to the payment of the particular debts, and that it recovers to the debtors substantial benefits, injurious to the creditors not secured. The questions thus presented, are not of the first impression in this court, but are controlled by adjudications which legislation alone can change. When inconvenience has resulted from these adjudications, the legislature has applied the corrective. If they were disturbed by the courts, touching so nearly as they do, the daily transaction of business; sanctioned as they are by the profession, who, relying on them, advise conveyances; and by the practice of the community who make and accept such conveyances, not only would injustice to individuals follow, but titles to property

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would be rendered insecure, and distressing litigation provoked and fostered.

It is conclusively settled, that a debtor in failing circumstances, or actually insolvent, has the right of preference among his creditors. He may assign his property for the payment or security of one, to the exclusion of all others. Prior to the Code, the only limitation on this right of preference was, that the property transferred should be devoted, absolutely and unconditionally, to the payment of the preferred debts, without the reservation to the debtor of any personal benefit. The whole, or a part of his property, could be assigned and appropriated to his creditors in equal or unequal proportions. He could, also, stipulate that the creditors accepting the assignments should release him from all further liability on their demands. The authorities are collected in 1 Brick. Dig. 128, §§ 75, 76. The Code declares an assignment, or other conveyance stipulating for the release of the debtor, fraudulent and void as to the creditors of the grantor.—Rev. Code, § 1866. General assignments are not prohibited—preferences created by them are annulled, and they are converted into a security for the equal benefit of all creditors.—Rev. Code, § 1867; *Holt v. Bancroft*, 30 Ala. 193; *Price v. Mazange*, 31 Ala. 701. It was deemed in violation of sound policy to arm an insolvent debtor with the power of exacting from creditors a release from liability, as the price of a preference in payment or security, and though assignments and other conveyances with stipulations for a release, had been supported, the statute intervenes and declares them, for the future, fraudulent. So it was deemed sound policy required that all general assignments, which, as defined by this court, are conveyances of all, or substantially all of a debtor's property, by mortgage, deed of trust, or assignment, for the security of debts, without regard to the preferences expressed in them, should enure to the equal benefit of all creditors. No other changes in the principles settled by judicial decision, touching assignments, or other conveyances for the security of creditors, has been wrought by legislation. The legislature, not having intervened, we repeat, it is not for the courts to depart from these principles; nor, it seems to us, to look with disfavor on conveyances the legislature have not condemned, and the community are in the daily habit of giving and accepting, under the sanction of the law as the courts have declared it.

Whatever may be the form in which the preference is given—whether that of an assignment, or of a mortgage, or of a deed of trust, it must be made in good faith, without an intent to defraud other creditors. Omitting for future con-

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sideration an alleged simulation of debts in the assignment, and there is no fact or circumstance which justifies the imputation of a fraudulent intent on the part of the debtors, and certainly not as to the creditor, or the trustee. The intent was to secure the creditor, and indebtedness, the justness of which is not disputed. The debtor had the right to give, and the creditor the right to demand and to accept security. The property conveyed is not in disproportion to the amount of the indebtedness, and the time for the execution of the trusts by a sale, and the conversion of the property into money, and its application to the payment of the debts is not unreasonably prolonged. It is not possible, on these facts, to found the imputation of fraud. If there be fraud which vitiates the transaction, it must be deduced from the stipulations and conditions of the assignments. The principle by which these are to be tested, are well defined. In the absence of an actual intent to defraud, which would vitiate the conveyance, however just and fair its provisions appeared on its face to be, no assignment, or mortgage, or deed of trust for the security of creditors, has been declared void, if it distinctly and irrevocably declared the uses for which it was made, and without reserving to the debtor any personal benefit, the property was absolutely and unconditionally, within a reasonable time, devoted to the payment of the secured debt.

The assignment contemplates that the planting operations of the debtors should be continued for the current year, under their supervision, and that future advances should be made by the creditor, for their successful prosecution: and it is this feature which is supposed to be inconsistent with an absolute, unconditional appropriation of the property to the payment of the enumerated debts, and is, in effect, a reservation for the use of the debtors. Conveyances with stipulations for the continuance of planting for the current year, when the property conveyed is of the kind employed in that business, have been too often supported in this court for their validity now to be questioned.—*Ravesies v. Alston*, 5 Ala. 297; *P. & M. Bank v. Clarke*, 7 Ala. 765; *DuBose v. DuBose*, *Ib.* 235; *Graham v. Lockart*, 8 Ala. 9. If the crops to be produced are, with the existing property, to be devoted to the payment of the secured debts, it has not been supposed such a stipulation is a reservation of a benefit to the debtor, though thereby the residuum which must revert to him may be increased. It is not unusual in assignments to provide that the assignees, or the debtor, under their direction, may continue the business, and if it appears this is done, not for the interest and benefit of the debtor, and to

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the prejudice of unsecured creditors, but to promote the interests of the creditors who are preferred, they are sustained.—Burrill on Assignments, 281. In *Cunningham v. Freeborn*, 11 Wend. 240, the property assigned was a foundry, and the assignees were authorized to continue the business, for the purpose of working up materials, and completing the manufacture of any of the assigned property, and to pay such expenses as might be incurred thereby. Speaking of this provision of the assignment, Justice NELSON said: "In all this, I can see no violation of law, or of honesty and fairness aside from the principle of preference, which we are not at liberty to question. The establishment was large, and embraced the whole of the fund out of which the debts must be paid, if at all. It was a kind of property not readily convertible into money, and valuable and profitable only in the the business in which it had been employed, and we cannot say that this provision in the assignment was injudicious, much less illegal. The chance of a sale might be greater and better, by keeping the establishment in operation, than in the abandonment of it." A similar decision was made in *DeForest v. Bacon*, 2 Conn. 633; *Kendall v. New England Carpet Co.* 13 Conn. 283; *Foster v. Saco Manufacturing Co.* 12 Pick. 451, and *Woodward v. Marshal*, 22 Pick. 468. The court of appeals in New York have overruled *Cunningham v. Freeborn*, but on reasoning, which is in conflict with the views this court has uniformly taken of these voluntary conveyances by insolvent debtors, for the security of creditors.—*Dunham v. Waterman*, 17 New York, 9. Of course, as is suggested in one or more of the cases cited from our own reports, if an assignment contemplated the indefinite continuance of planting operations, it could not be sustained. But when the provision is simply for the temporary use, profitably to the creditor, of the property conveyed, until a sale can be effected judiciously, it is difficult to perceive any substantial objection to it. But the fact must not be overlooked, that in this assignment, the crops are more than the products of the property conveyed. They form a distinct part of the subject matter of the conveyance, and were to be cultivated not only on the lands conveyed, but other lands of the debtors not conveyed. They were the proper subject matter of assignment; and security for advances to aid in their cultivation, is sanctioned by the common law, and by the statutes. The employment of the personal property assigned, in the cultivation of the crops, was the employment of it, in a mode which would increase the security of the creditor, and the fund for his payment. We do not understand that the assigned property must be imme-

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diately converted by a sale. The sale must be made in a reasonable time, and the reasonableness of any delay for which the assignment provides, will depend on the character of the property, the cause for it, and the particular circumstances of the case. It seems not to have been doubted, that a sale of the real estate would have been injudicious, leading to its sacrifice, ruinous alike to debtor and to creditor, if made immediately. If stripped of the personal property on it, intended for its cultivation, it would have been abandoned, for it was an unsuitable season for renting. When these facts are all considered, it seems unreasonable to say it was illegal, or unjust, or immoral, to use the personal property, as it was used in the cultivation of crops on the lands conveyed, and the lands not conveyed. Or, that the provisions of the assignment authorizing the use, are a reservation for the benefit of the debtor. The only benefit accruing to him, was the diminution of his debt, so far as the crops would satisfy it. It is said, "the crops were to go to the creditor, but not as belonging to the creditor, but as belonging to the debtor, and to be credited upon his debts." The creditor has precisely the interest in reference to the crops, he has in reference to the lands, and in the existing personal property an equity to compel the trustees to appropriate them to the payment of the debts. The trustees have the same title to the crops, they have to the lands and personal property—the entire title, legal and equitable. The debtors have no other interest in the crops than they have in the other property. There is no distinction between them made by the assignment, and the trustees could, whenever they deemed it necessary, or they were directed by the creditor, have taken possession of the crops, or of the other property, real or personal. The case of *Ticknor and Day v. Wiswall*, 9 Ala. 305, (s. c. 6 Ala. 178) is not an authority for declaring this stipulation the reservation of a benefit to the debtors, or a fraud on other creditors. The two cases do not seem to us to bear any resemblance. There, an insolvent debtor, a merchant, executed a mortgage of real estate, and of personal property, including a stock of goods, wares and merchandise, stipulating for the retention of possession and use, with the power to rent the real estate, and to receive the rents and profits; and with power to *sell and dispose of the goods, and other personal property*, and his duty was, as expressed in the stipulation, *from the nett proceeds*, to pay and satisfy the mortgage debt. The law day of the mortgage had passed for more than a year, his possession was unbroken, and he had continued to sell and dispose of the goods, and to replenish the stocks, not diminishing the mort-

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gage debt. It was in reference to this stipulation, and the continuous possession of the goods, dealing with them as his own, that Judge GOLDTHWAITE said: "It is difficult to conceive why a debtor, on the eve of insolvency, should provide for the reservation of the power to sell, or of the use of the mortgage property, unless some benefit to himself was intended, and it seems equally so, to imagine how a creditor could consent to receive such a security without lending himself to carry out the debtor's intention." The court declined, when the case was first before it, to declare the stipulation avoided the mortgage. The retention of possession after the law day, and the continuous exercise of acts of ownership by the mortgagor, taken in connection with the unlimited power of disposition, created in the judgment of the court, a presumption of fraud, which it was the duty of the mortgagee to explain and remove, and which, if not explained, was fatal to the validity of the mortgage. The case does not declare, nor was it intended to declare, that a mortgage is avoided by the reservation of the possession and use of the mortgaged property, if not extended to an indefinite period beyond the law day, or, if the law day is not so unreasonably postponed, as of itself from the mere delay, to tie up the property for the ease and advantage of the debtor. Beyond this, the court could not have gone, without infringing the rule so often announced, that the reservation to the mortgagor of possession and use, until the law day, was the mere expression of what the law would have implied in its absence. In any view, the distinction between that case and the present, is marked and palpable. The debtors are not entitled to the use of the property, nor have they any power of disposition. The use is appropriated, as is the property itself, to the security and payment of the preferred debts, and is for the benefit of the creditor, rather than the benefit of the debtor. The power to sell, or otherwise dispose of the property, is exclusive in the trustees, and no right to control it resides in the debtors, by any term of the assignment. There are several cases, subsequent to that of *Ticknor & Day v. Wiswall*, which would probably now compel the courts to declare the stipulation for possession, with the right to dispose of such property, as goods, wares and merchandise, made by an insolvent merchant, would be construed as the reservation of a benefit to the debtor, inconsistent with an absolute, unconditional appropriation of the property to the payment of the secured debts.—*Constantine v. Twelves*, 29 Ala. 607; *Price v. Mazanye*, 31 Ala. 701; *King v. Kenon*, 38 Ala. 63. These cases do not seem to us to have any feature in common with the case under consideration.

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The power of disposition, with no other security for its just exercise, than the integrity of the debtor, is too nearly allied to a power of revocation to be supported, especially when the subject is property, held only for sale in the ordinary course of the debtor's business.—Bump on Fraud. Conv. 161. A careful examination of this assignment, fails to disclose that it contains any stipulation or provision, condition or trust, not heretofore pronounced by this court, free from mischievous qualities. They may be discountenanced by other tribunals, and may not be in harmony with their jurisprudence; an inquiry on which, it is not our province to enter. It would be gross injustice, if the conveyance was now annulled, when the parties were invited into it, by an unbroken chain of judicial decision.

Every assignment, or security for the payment of debts, necessarily involves a resulting trust to the debtor. When the debts are paid, if the property, or any portion of it remains, it reverts to the debtor. The creditor has an equity merely to appropriate it to the payment of his debt, which is extinguished by the satisfaction of the debt. If trustees are interposed, and clothed with the title, the title is charged with the trusts, and when these are performed, the title terminates. Hence, from the case of *Malone v. Hamilton, Minor*, 286, to the present time, it has uniformly been held, that when an assignment is for the security of a part only of the grantor's creditors, to the exclusion of others, a stipulation for the reversion to the debtor of any part of the property, or for the payment to him of the surplus of the proceeds of sale, which may remain after the satisfaction of the debts, is but the expression of the legal effect of the conveyance, and does not affect its validity.—*Johnson v. Cunningham*, 1 Ala. 258; *Ravesies v. Alston*, 5 Ala. 297; *Hindman v. Dill*, 11 Ala. 689; *Brown v. Lyon*, 17 Ala. 659; *Miller v. Stetson*, 32 Ala. 161.

The remaining question, touching the validity of the assignment, is the alleged simulation of debts. The debts constitute the consideration which supports the assignment, and must be actual, existing liabilities. The wilful, deliberate introduction of fictitious debts, or the intentional exaggeration of the amount of real debts, in which debtor and creditor participate, is feigning a consideration, and a fraud, which will vitiate the assignment. Error in the description of debts, or the introduction of fictitious debts, to which the creditor is not privy, will not vitiate it.—*Stover v. Henington*, 7 Ala. 142; *Graham v. Lockhart*, 8 Ala. 9; *Anderson v. Hooks*, 9 Ala. 704; *Tatum v. Hunter*, 14 Ala. 557. The simulation supposed to exist in the present case, lies in the supposition

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that the assignment operates a security for the acceptance of the bills of exchange and for the judgments which were the consideration of these bills. But the assignment is not a security for the payment of the judgments, nor does it purport, nor was it so intended to operate. It is a security for the bills of exchange, which are not the same debts as the judgments, but separate and independent debts, involving other parties, and different liabilities. The judgments were presently due, capable of enforcement by compulsory process, at the election of the creditors. The bills were running to maturity, not causes of action until they became due, and then, if not paid, the subject of suits. The defendants in the judgments, were alone liable for their payment. The bills of exchange were the debts primarily of the acceptors, as to the creditor, and if they failed to pay, of the drawers, if they were charged by notice of the dishonor. The payment of the judgments, would have satisfied all liability of the drawers to the acceptors, but it would not have extinguished their liability to the holders of the bills. The assignment is not open to the imputation therefore of securing two separate and distinct debts, when in fact but one existed. It operates a security for but one debt, and that is the liability of the company on the acceptances. Notes, or bills, are frequently given for pre-existing debts, and payable at a distant day from the maturity of such debts. They do not operate a payment, unless so intended by the parties. The only effect of taking them, is to suspend the remedy on the pre-existing debt, until they mature.—*McCravey v. Carrington*, 35 Ala. 698; *Mooring v. Ins. Co.* 27 Ala. 254. If an assignment was made for the security of such note or bill, with a reference to a prior security for the pre-existing debt, it would scarcely be supposed, the assignment was open to the imputation of keeping alive two debts, when but one existed. Such a case would be stronger than the one now presented, and if the property assigned exceeded in value the amount of the secured debts, it might be a circumstance of suspicion, but could not be more. It seems to be supposed, the judgments were satisfied by the acceptances, and therefore the assignment is deceptive in treating them as unsatisfied, and the plaintiffs, or their assignees, as having the right to issue executions on them. Whether the acceptances should operate a satisfaction of the judgments, was the legitimate subject of agreement between the judgment creditors, the debtors, and the acceptors of the bills. As in the case of a payment of a judgment by a stranger, whether it shall operate a satisfaction, depends on the intention and agreement of the parties when it is made. The judgment may, as in this case, be

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transferred, and execution in the name of the plaintiffs, for the benefit of the party paying, authorized.—Freeman on Judgments, § 468. In *Harbeck v. Vanderbilt*, 20 N. Y. 395, a judgment had been rendered against several defendants, one of whom paid in cash the proportion he was liable to pay, as between him and his co-defendants, and for the remainder gave the plaintiff his negotiable promissory note, indorsed, for his accommodation, by Vanderbilt. An assignment of the judgment to a trustee for the protection of Vanderbilt, against his liability as indorser, was supported, the court saying: "The assignment of the judgment to protect him against his liability, was just as legitimate and proper, as it would have been to indemnify him for money paid." It is impossible, it seems to us, to misunderstand the transaction between the parties, or to deduce from it an illegal or fraudulent intent. The judgments were transferred to the company, the right to issue execution on them at pleasure was reserved, and operated as a certain security for indemnity against their liability as acceptors. So regarding it, the company had two securities for protection against their liability, that afforded by the assignment and that afforded by the judgments. It is not an objection to the assignment that any one or more of the debts were already secured by mortgage or by judgment.—Burrill on Assignments, 142. It not infrequently occurs that a creditor has more than one security for a debt, or more than one fund, to which he can resort for payment. If other creditors have rights on one only of such securities, or can look to one only of the funds, the powers of a court of chancery are adequate to protect them, by requiring that the favored creditor shall first exhaust the security, or fund, to which they can not resort, before appropriating the other. In such cases it may be proper for the creditor, if taking a new security by assignment, to mention the prior securities. The failure to do so, is not necessarily inconsistent with good faith, and can not be regarded as a badge of fraud.—*Stern v. Fisher*, 32 Barb. 198.

It is insisted, however, that the connection between the judgments and the accepted bills, was concealed, and the concealment was premeditate, to avoid the appearance of a general assignment, and its operation as a common security for all creditors. It is difficult to read the assignment without discovering that there is a connection between the accepted bills and the judgments, or without the discovery of facts which would excite the reasonable belief of such connection. The reservation of a right to enforce the judgments, notwithstanding the assignment, is unnecessary, if the right was not reserved to some party to the assignment, having authority

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to control them, and a party who, by accepting the assignment, would waive that right, or might be supposed to waive it. There is no party to the assignment, other than the beneficiary acquiring rights by it, which are at all inconsistent with the enforcement of the judgments, and the only rights it acquires, bearing the semblance of inconsistency, is that of indemnity against the acceptances of the bills. Security for the other debts, of which the beneficiary was the creditor, was not inconsistent with the enforcement of the judgments. As matter of fact the charge of concealment is unwarranted, and the motive for the concealment does not exist, if the facts had been distinctly stated, and not left in any degree to inference, the transaction is not, in legal effect, a general assignment. We have no doubt the parties intended to avoid a general assignment, and it was their legal right to avoid it. If they have resorted to no contrivance, and no covinous practices to avoid it, while they may have acquired liens on all the debtor's estate, they have violated no law, and offended no right of other creditors.

A general assignment, enuring under that statute to the equal benefit of all creditors, as it may be defined under our decisions, is a voluntary transfer, by a debtor, of all, or substantially all, of his estate subject to execution, for the security of one or more creditors in preference to others.—*Holt v. Bancroft*, 30 Ala. 193; *Price v. Mazange*, 31 Ala. 701; *Warren v. Lee*, 32 Ala. 440; *Stetson v. Miller*, 36 Ala. 642; *Longmire v. Goode*, 38 Ala. 579; *Crawford v. Kirksey*, 55 Ala. 282. As will be seen hereafter, the term *voluntary*, is not used in the sense in which it is frequently employed—that of being without *valuable consideration*. It is not material what may be the form of the transfer—it may be in the form of a mortgage, or of a deed of trust, or of an assignment proper and technical, if security to particular creditors, in preference, or to the exclusion of others, is intended, and it operates as the parties to it intend. Such an assignment may be made by one, or by several instruments, and if made by several, they may be executed concurrently, or there may be an interval between the times of their execution. If they are parts of the same transaction, executed in pursuance of a purpose, to convey the debtor's entire property, or substantially all of it, as security for one or more creditors, to the exclusion of all the others, the several instruments will be construed as one, operating as one would operate, a general assignment. Whatever may be the form or character of the instrument, to operate as a general assignment, it must proceed from the will, and be the act of the debtor; hence, we defined the transfer as *voluntary*. It is the preference of

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creditors, springing from the mere volition of the debtor, created by his act, investing the creditor with a specific lien on his entire estate, the statute condemns. Prior to the statute, such preferences were supported—now they are annulled, and the conveyance in which they are found, is preserved as an equal security for all creditors. The statute has no reference to liens arising by operation of law—these are not within its letter, or spirit, or the mischief it was intended to avoid. The lien acquired by the assignment, operated on a part only of the debtor's property. The lien of the executions issuing on the judgments operated on their entire estate. The assignment was an absolute transfer of title and estate, the act of the debtor. The lien of the executions was not in any sense a transfer—it was not *jus ad rem*, or *jus in re*. It was simply a right to charge the debtor's estate, by compulsory sale, with the payment of the judgments.—Freeman on Judgments, §§ 338-42.

In Pennsylvania, a statute provides, that all assignments in trust for the benefit of one or more creditors, creating preferences, shall enure to the benefit of all creditors in proportion to their demands. The question, whether judgments confessed, operating a lien on the estate of the debtor, and thus creating a preference, fell within the statute, has been several times considered by the courts of that State.—*Blakey's Appeal*, 7 Barr. 449; *Woman v. Walfersberger*, 19 Penn. 59; *Grey v. McIlree*, 26 Penn. 92. In the case last cited, the court say: "There is little, if any, similarity between an assignment and a judgment. The one is an absolute transfer of its subject matter, whilst the other is but the means whereby to enforce payment of a debt. An assignment passes the property in real and personal estate, rights and credits, whilst a judgment, of itself, gives no vested estate in any of the property of the defendant, merely creating a lien upon his real estate, if any he has at the time of its entry." When several instruments are construed together, as constituting a general assignment, it is because they are of a kindred nature, operating as a transfer of property, in pursuance of a common purpose to prefer particular creditors. The lien of the executions was not created by the debtors—it was created by law, and was in existence before the assignment was contemplated. It is one of the superior rights the law awards to the vigilance of the creditors, who had reduced their claims to judgments. To connect it with a subsequent assignment, that the two may operate as a general assignment, would simply deprive these creditors, or their assignees, of a legal right, honestly acquired, and give it to another, having no superior equity. Liens created by law may be

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abrogated by the legislature, at their discretion, without invading any constitutional guaranty. The day after the execution of the assignment, the statute creating the liens might have been repealed. Would this repeal have changed the character of this transaction—converting it from a general, into a special assignment? The error which, it seems to us, pervades the whole argument of the appellee, is in attempting to connect rights created by law, with rights created by the act of the debtors, and give them the same operation and effect. We are not able to pronounce the assignment fraudulent, or to declare that the transaction between the parties should operate as a general assignment.

The decree must be reversed, and a decree here rendered, dismissing the bills, original and amended, and the appellee must pay the costs in this court, and in the Court of Chancery.

STONE, J., not sitting.

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Bill in Equity to Enjoin Foreclosure of Mortgage and to obtain relief on account of usury.

58	523
99	178

58	523
100	616
101	308
101	534

58	523
130	152
130	509

1. *Usury; bill for relief from mortgage on account of; practice.*—Where a complainant files a bill to obtain relief from a mortgage on account of usury, he must either bring into court the money legally due, or submit himself to the court on an offer to pay, so that the court may, without more, compel him to do equity as a condition for granting relief, whereupon the court may decree a foreclosure without the filing of a cross bill.

2. *Same; practice; admission by defendant's solicitor.*—Where, in such a case, a decree of foreclosure is authorized on the original bill, without the filing of a cross bill, the decree will not be disturbed, because on the case made by defendant turning his answer into a cross bill, which complainants answered, the solicitors admitted that one of the complainants was a married woman at the time the execution of the mortgage conveying her statutory estate, there being nothing in the answer authorizing the introduction of such proof, or the making of such defense.

3. *Misjoinder of parties complainant; when feme covert cannot claim personal relief.*—To a bill seeking relief from a mortgage on account of usury, parties complainant should not be joined unless they are entitled to common relief. And though each and all may be entitled to make the defense of usury, yet where the rights of one of the complainants is that of a *feme covert* claiming that the property is her statutory estate, and not subject to the mortgage made by her for the security of another's debt, such right is personal to her, and she cannot claim this personal relief under a bill filed by her conjointly with her husband and another male complainant.

4. *Decree rendered in vacation; repeal and amendments of certain acts in refer-*

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ence thereto ; when an act repealed or revived.—1. The provision of the Revised Code (§ 3470), which authorized the Chancellor to render decrees in vacation, within six months, was repealed by the amendatory act of December 8th, 1873, which authorizes decrees in vacation, within ninety days, by consent. This latter act was repealed by "an act to repeal an act to amend § 3470 of the Revised Code of Alabama," approved Feb. 4th, 1876, which provided in a separate section that Chancellors might, "in difficult cases, render decrees in vacation, within six months after the submission of causes." 2. Under the Constitution of 1868 (Art. 4, § 2), section 3470 of the Revised Code was *ipso facto* repealed by the amendatory act of 1873, although it contained no express words of repeal. 3. The repeal of the amendatory act, by the act of Feb. 4th, 1876, did not revive or restore that section, the Constitution of 1875, (Art. 10, § 2), forbidding any law to be 'revived, amended,' or the provisions thereof extended or conferred, by reference to its title only. 4. The title of the act of Feb. 4th, 1876, "To repeal an act to amend § 3470 of the Revised Code of Alabama," does not express any intention to revive that section, and is so restricted in its title that it does not authorize the incorporation, in the one subject to which it relates, of a provision reviving that section, or substantially re-enacting it in terms; and hence its second section is unconstitutional. 5. From the passage of the act of Feb. 4th, 1876, up to the time when the Code of 1876 went into effect, there was no statute authorizing the Chancellor to render decrees in vacation without the consent of the parties. 6. What effect the incorporation of the second section of the act of Feb. 4th, 1876, into the Code of 1876, will have upon cases arising since said Code went into effect, is not decided.

APPEAL from the Chancery Court of Lee.
Heard before the Hon. N. S. GRAHAM.

The case may be fully comprehended from the opinion.

G. D. & G. W. HOOPER, for appellants.

ABERCROMBIE & GRAHAM, and J. J. ABERCROMBIE, *contra*.

No briefs came to Reporter.

STONE, J.—The present record is in a very embarrassing condition. An original bill was filed by John C. W. Rogers, Anthony F. Rogers and Martha A. Rogers—the last a married woman, suing by Anthony F., her husband and next friend. The bill charges usury in excessive form, and seeks to enjoin the sale of the mortgaged property under the power of sale contained in the mortgage, on account of the alleged usury. It claims no other relief.

The bill contains this clause: "Your orators and oratrix hereby offer to pay to the said E. A. Torbut such sum as, after stating said account, shall appear to have been received by the said John C. W. Rogers from said James M. Torbut, together with the legal interest thereon." The bill charges that the mortgage under which Torbut was proceeding to sell, embraces "the following property of complainants, Anthony F. and Martha A. Rogers, to-wit: the north

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half of section," &c. In the prayer for relief is the following, among other clauses: "Complainants further pray that, on final hearing, said E. A. Torbut be restrained from proceeding to collect, by sale of said mortgaged premises, or foreclosure of said mortgage, any sum, except such as by said account may be fixed and ascertained to be due him from said complainants." There is no other averment in the original bill which tends to show that Mrs. Martha A. Rogers had any interest in, or claim to the property in controversy. Nothing said about the nature of her claim, whether a separate estate or not, and if separate, whether statutory or equitable.

The answer of the defendants admits the usury charged; states the note and mortgage are the property of E. A. Torbut, and that James M. Torbut has no interest in them; that the said E. A. Torbut has proposed to complainants, through his attorney, to accept in full payment the amount admitted in the bill to be due; and he is now willing to accept the same in full satisfaction; but that the "complainants declined and refused to make good their offer contained in their bill to pay the principal and legal interest, and still refuse to pay principal and legal interest."

1. It will be observed that up to the present stage of this case—that is, up to the formation of the issue, if issue it may be called—the record presents but a single question: that of the right of complainants to be relieved against the excess of interest charged above the legal rate. That question is fairly presented, and the bill sufficiently offers to do equity, by proposing to pay the amount of money borrowed, with lawful interest thereon. Without this offer, the complainants would have had no standing in court, and their bill would have been demurrable.—*Nelson v. Dunn*, 15 Ala. 501; *Tucker v. Holley*, 20 Ala. 426; *Crews v. Threadgill*, 35 Ala. 334, 342; *Martin v. Martin*, 35 Ala. 560; *Miller v. Bates*, *Ib.* 580; *Cain v. Gimon*, 36 Ala. 168; 1 Eq. Ju. § 301; *Fanning v. Dunham*, 5 Johns. Ch. 122, 142-3; *McGuire v. Van Pelt*, 55 Alabama, 344. The rule in such case is, that a complainant asking such relief, must either bring the money borrowed, and interest, into court, or he must, by his offer, submit himself to the authority and jurisdiction of the court, so that the court, without more, may compel him to do equity, as a condition upon which the relief prayed will be granted. This is the spirit, this the sense of the rule. In *Branch Bank of Mobile v. Strother*, 15 Ala. 51, 60, it was said, "The reason why it is necessary, in a bill seeking relief against usury, to offer to pay the amount actually due, is, that the court will not interfere, unless the complainant will either

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pay, or submit that a decree be rendered against him for the principal and lawful interest; and the court has not the power to render a decree against him on his own bill, unless he makes this offer by the bill."—See, also, *Fanning v. Dunham*, *supra*. Under these authorities, it is clear that, on the bill and answer, without a cross bill, the court was authorized to ascertain by its decree the amount due Torbut, and, if not paid, to order a sale of the lands conveyed. Hence, no cross bill was necessary to support a decree ordering a sale of the lands.

2. The defendants, however, made their answer a cross bill, prayed process against defendants (complainants in the original bill), and prayed for a decree of foreclosure. The answer of Mrs. Rogers to the cross bill, differs from the averments of the original bill, only in the following particulars: She avers that at the time she executed the note and mortgage, she was a married woman, wife of Anthony F. Rogers; that no consideration moved to her for executing said papers, "and that she then owned a life estate in all the property described in said mortgage (with the exception of that described as being in the city of Opelika); said life estate was created by the will of Daniel Rogers, deceased." Still, no averments in any of the pleadings that the lands were of the separate estate of Mrs. Rogers. There is an agreement in the record, signed by the solicitors of both parties, with a copy of the will of Daniel Rogers attached and made part of the agreement, which admits that Mrs. Rogers was a married woman when she signed the note and mortgage; that she owned a life estate in the lands, and, construed in connection with the will, shows that the same was her statutory separate estate. Such is the proper construction of the will of Daniel Rogers, for it contains no words excluding the husband's marital rights.—See 2 Brick. Dig. 81-2, §§ 165, 169, 172, 173, 175, 178, 179, 184, 185, 186. We have, then, a case in which, according to the pleadings, the decree is right. According to the agreed facts, it is wrong. See *Bibb v. Pope*, 43 Ala. 190; *Northlinton v. Faber*, 52 Ala. 45; *Peebles v. Stolla*, 57 Ala. 53. If this case were at all dependent on the testimony, we would feel it our duty to reverse the decree of the Chancellor. The testimony fails to support the case made by the pleadings. The original bill and answer make a complete case for the relief which was granted, and all else must be disregarded. The Chancellor did not err in the substance or principles of his decree. This renders it immaterial whether there was or was not a proper issue formed on the cross bill.

3. There is a difficulty in this case, even if the original
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bill were amended, so as to show Mrs. Rogers' title to the lands, and that the life interest is her statutory separate estate. She and Anthony F. Rogers, her husband, and John C. W. Rogers, are joint complainants, and, unless they are entitled to common relief, they should not have been joined. Each and all are entitled to make the defense of usury, but the rights of Mrs. Rogers as a *feme covert*, and to claim that the property is her statutory separate estate. and not subject to the mortgage made by her for the security of another's debts, is personal to her. She can not claim this personal relief under a bill filed by her conjointly with the male complainants in this cause.—*Bibb v. Pope*, 43 Ala. 90; *Northington v. Faber*, 52 Ala. 45; *Peeples v. Stolla*, *supra*; 1 Brick. Dig. 750, §§ 1634-5-6.

4. The decree of the Chancellor was rendered in this cause in vacation, without any consent therefor entered into by the parties or their solicitors. It is here contended that this decree is a nullity, because it was rendered in vacation without agreement. And this depends on another position taken for appellant, namely: that the statute under which the Chancellor so rendered his decree was not constitutionally enacted. As the statute on this subject stood when the Revised Code was adopted in 1867, the provision was: "The Chancellor must, when practicable, render his decrees in writing, during the session of the court at which the cause is heard; he may, however, in difficult cases, render a decree in vacation within six months after the hearing."—Code of 1867, § 3470.

On the 8th of December, 1873, the bill was enacted "To amend section 3470 of the Revised Code of Alabama." By said enactment, the section named was amended so as to read as follows: "The Chancellor must, in all cases, render his decrees in writing during the session of the court at which the cause is heard. He may, however, by written consent of the counsel in the cause, render a decree in vacation within ninety days after the hearing."—Pamph. Acts, 58. This repealed section 3470 of the Revised Code, under the Constitution of 1868, art. 4, sec. 2.

On the 4th of February, 1876—Pamph. Acts 184—the legislature enacted the statute "To repeal an act entitled an act to amend section three thousand four hundred and seventy of the Revised Code of Alabama, approved December 8, 1873." Such is its caption. By the first section it recited and repealed the amendatory statute which we have copied above. The whole amendatory act of Dec. 8, 1873, was copied in *extenso* in the repealing act of February 4, 1876; with the superceded words, "be and the same is hereby re-

[Rogers et al. v. Torbut et al.]

pealed." The act of Dec. 8, 1873, had repealed section 3470 of the Revised Code.—See Constitution of 1868, Art. 4, § 2. And the first section of the act of Feb. 4, 1876, repealed the act of Dec. 8, 1873. This, under the common law rule, would revive the statute first repealed.—Sedg. Stat. and Const. 116. But such is not the rule under our present constitution. It provides, Art. 4, sec. 2, that, "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length."—See *Dane v. McArthur*, 57 Ala. 448. The legislature, in the act of Feb. 4th, 1876, doubtless attempted to conform to this requirement of the Constitution, for they added a section, number 2, which is substantially the same as section 3470 of the Revised Code, and which is now section 3896 of the Code of 1876. If that section was constitutionally enacted, then the Chancellor was authorized, without any consent of counsel therefor, to render his decree in vacation, within six months after the submission. Was the second section constitutionally enacted? The Constitution ordains, art. 4, sec. 2—that "each law shall contain but one subject, which shall be clearly expressed in the title," with certain exceptions not necessary to be noticed here. The caption of the act of February 4th, 1876, not only does not express any intention to revive section 3470 of the Revised Code, but it makes no mention whatever of that subject. There is nothing in the caption which authorizes us to declare this subject is expressed or embraced within it; and the result is, that section 2 of the act is unconstitutional, because not expressed in the caption.—*Lowndes County v. Hunter*, 49 Ala. 507.

A caption might have been chosen which would have included this section, and the residue of the statute as one subject; but it was not done. We need not inquire what effect the incorporation of the second section of the act of 1876, in the Code of that year, will have on its operation after that Code became operative—December 9th, 1877. The decree in the present case was rendered before that time.

The decree being rendered in vacation, without the consent of counsel, must be reversed, and the cause remanded.

[McRae et al. v. Newman.]

McRae et al. v. Newman.*Bill in Equity to recover balance due on Mortgage.*

1. *Conveyance to be delivered when money paid, and mortgage to secure unpaid money; when operative; reversion in vendor; what operates as notice to intermediate purchaser.*—Where the owner executes a conveyance of lands, and deposits the same with an agent to be delivered to the purchaser when he complies with the contract, and executes a mortgage back to secure the unpaid purchase money, such instruments become operative only from the date of delivery; the title remains in the vendor until such delivery and *eo instanti* returns to him by the mortgage so as to preclude the interposition of any title or right in any other person; and the vendee's mortgage, if duly recorded within ninety days (Rev. Code, § 1657), operates as a notice of its contents to one purchasing in the interval between its delivery and record.

2. *Same; what does not estop vendor from enforcing mortgage given by original vendee.*—In such a case, the mere fact that an attorney, while he held the deed to the original purchaser, as an *escrow*, wrote out a conveyance, at the instance of such purchaser, to a third person, who paid the purchase money, without actual notice that his immediate vendor had not paid, does not estop the vendor from enforcing the mortgage of the original vendee, if recorded in due time—such second purchaser never making inquiry of the attorney, and the attorney not being informed as to the terms of payment agreed on between the original and second purchaser.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. B. B. McCRAW.

S. W. GOODE, with whom was F. M. WOOD, for appellants.—
I. As Kolb had no legal estate at the time he made the mortgage to Newman, no legal estate passed by that conveyance to Newman; the mortgage conveyed only the equitable estate which Kolb then had for the security of the debt to Newman.—*Chapman v. Glassel*, 13 Ala. 54; *Edmonson v. Montague*, 14 Ala. 376.

II. Kolb's subsequent acquisition of the legal title did not enure to Newman, so as to unite the legal to the equitable estate conveyed to him by the mortgage; for the mortgage could act upon the subsequently acquired legal estate of Kolb, and have the effect of vesting the legal estate in Newman only by way of *estoppel* or *rebutter*; but McRae is not estopped by the covenants of warranty in the mortgage, because:

1. McRae is a stranger to that conveyance, and many acts which estop a party shall not estop a stranger.—*Rawlen's Case*, 4 Co. 53; 14 Ala. 378 and cases cited; 1 Lev. 43, Co. Lit. 550.

[McRae et al. v. Newman.]

2. There can be no estoppel where an interest passes; and here an interest did pass, viz.: the equitable interest which Kolb had at the time he made the mortgage.—Smith's Lead. Cases, pp. 584 and 610.

3. The cases which support the doctrine that the grantee and his assignees are estopped from denying the grantor's title, are not analogous to this case, as in none of them was the subsequent title derived from the grantee in the prior conveyance, and this makes a material difference, because McRae had a right to suppose that if Newman had any lien on the land on or prior to the 1st of January, 1867, he had assigned or conveyed it to Kolb by his deed delivered to Kolb on the 7th of January, 1867.

4. The after-acquired title of Kolb was not actually transferred and passed to Newman by the covenants in Kolb's mortgage; but Kolb held the title in trust for Newman, and a trust would have resulted to Newman, had not Kolb conveyed the legal title to McRae, an innocent purchaser for value and without notice.—Rev. Code, § 1591; 2 Smith's Lead. Cases, p. 637.

5. The following authorities are against the doctrine that the grantee and his assignees are estopped from denying the grantor's title, except they are assignees with notice.—Rawle's Covenants for Title, pp. 430-8 and notes; 15 Ga. 521; *Briants v. Vinzant*, 18 Ga. 181; *Fairclota v. Jordan*, 18 Ga. 358; 2 Smith's Lead. Cases, 636 and 638.

III. Newman, as mortgagee from Kolb of the land, was not an innocent purchaser for value, because his agent, Shorter, wrote the deed from Kolb to McRae, and McRae had been in actual possession of the land for weeks before and at the time the mortgage was made. This, then, being a suit in equity and the whole difficulty having been caused by Newman's negligence through his attorney, this court will hold and decree that the "equity of the party who has been misled, is superior to his who has misled him," [Adam's Equity, p. 28], and that if McRae is entirely innocent, he cannot be made to suffer at the hands of Newman for Newman's own wrong.—2 Kent's Com. p. 825 and notes; 26 N. Y. 505; 27 Ala. 346; 16 N. Y. 125.

IV. The deed of the 16th November, 1866, from Newman to Kolb, took effect from its delivery to Kolb, and it cannot have relation back to its date so as to work a wrong to innocent purchasers like McRae.—1 John Ch. 297; *Frost v. Beckman*, 1 Th. Co. Lit. 475.

V. The lien of the vendor, against the vendee and voluntary purchasers under him with notice, or having an equitable title only, is admitted in this State.—*Burns v. Taylor*, 23 Ala.

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254. But it does not exist against purchasers under a conveyance of the legal estate made *bona fide* for a valuable consideration, without notice, if they have paid the purchase-money.—2 Sto. Eq. 1228; 15 Ves. 336; *Burch v. Carter*, 44 Ala.

VI. If McRae can be held to have had notice, actual or constructive, of the mortgage of 1st of January, 1867, under which Newman claims, or of any unpaid purchase money before he received his conveyance from, and paid the purchase money to Kolb, we admit that Newman must prevail in this suit. First, then, it is admitted, and if it were not admitted, the facts show that McRae had no actual notice of that mortgage. Then the only remaining question to be decided is, whether the recording of that mortgage was *constructive* notice to McRae. I think it was not, and that this can be demonstrated upon authority.

1. The mortgage bears date the 1st of January, 1867, and was delivered to Newman on that day, *i. e.*, to his agent, Eli Shorter.

2. The mortgage was not recorded till the 7th of March, 1867, and of course, was not on record at the time McRae received the two deeds, *i. e.* on 7th January, 1867.

3. The *legal* title was not vested in Kolb until the 7th day of January, 1867.

4. On that very day (7th January, 1867) Kolb delivered *both* deeds to McRae, and McRae already had possession of the land.

5. Kolb then mortgaged the land *six* days before he had the *legal* title to it.

VII. These being the facts, then we say that McRae was chargeable with notice only of incumbrances put upon the land by Kolb *after* the 7th of January, *i. e.*, after he, Kolb, had the legal title. In the *N. Y. Life Ins. Co. v. White*, (17 N. Y. 473), Judge DAVIS said, in delivering the opinion of the court: "It appears, from a statement in plaintiff's mortgage, that Staats purchased the premises in 1841. In preparing directions for a search the plaintiffs would naturally direct that an examination should be made for conveyances and mortgages executed by him from *that* date down to the time that plaintiffs advanced their money and took their mortgage. Such an examination, made with the strictest care and accuracy, would not have disclosed the existence of this loan-office mortgage." There seems to be two cases in which a writing, though recorded, avails nothing.

1. In case of a person who does not claim under the grantor.—*Gimon v. Davis*, 36 Ala. 589.

2. In case of persons who claim under a deed to the

[McRae et al. v. Newman.]

grantor *after* registry of the writing in question. ~~the~~ Party is not required to search the registry farther back than the conveyance to his grantor *quoad* to persons claiming under such grantor. See *Analy. com. et. Stat. L.* per John B. Minor, Prof. Univ. Va. Title "Registry of Deeds," 20. If this be the rule, then, McRae was bound to look for conveyances only from the time the *legal* title vested in Kolb, that is, from the 7th of January, 1867.

PUGH & BAKER, *contra*.—The case of *Nesbit et al. v. Warde, Ex. et al.*, has no application to the facts in this case. In the present case Kolb was in possession of the Fitzhugh plantation, under Newman, and had no written evidence of a title save the written agreement between Kolb and Newman. When McRae purchased from Kolb, the law required McRae at his peril to examine into and to inform himself of the character of the title by which he had possession of, and claimed the right to sell the land to McRae. Being charged by law with notice of the written agreement between Kolb and Newman, McRae necessarily had notice—was bound to know—that Kolb either had mortgaged to Newman, or, if he had not, his agreement bound him to do so, and it was McRae's business and duty, having notice of Kolb's contract with Newman, to see that Kolb had performed his contract with Newman. McRae, finding Kolb with Newman's deed in his possession, made no difference, because the Kolb and Newman contract informed McRae that Kolb might have Newman's deed after the payment of the \$4,000, but that \$6,000 more of purchase-money was due years after McRae's purchase, which had been, or was to be, secured by mortgage. How could McRae believe that Newman's deed to Kolb gave Kolb an unincumbered title when the law charged McRae with knowing that \$6,000 of the purchase-money due Newman was due years after McRae's purchase? When Kolb was found by McRae to be in possession without a deed, the law compelled McRae to find out why Kolb had no deed, and compelled him to find out the *truth*, and the truth was that he had no deed, because he had not complied with his contract with Newman, and that if he had not, he was bound to do so. In every aspect McRae fails to put himself in the position of an innocent purchaser without notice. Besides, Newman's debt against Kolb was not *pre-existing* to the mortgage, but was *co-existing* with the right to the mortgage, as evidenced by the Kolb and Newman contract.

MANNING, J.—Appellee, Newman, a citizen of Virginia, was in 1866, owner of a plantation in Barbour county, Ala.—
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bama, called the "Fitzhugh Place"; and in September of that year, an agreement was made between him and Reuben F. Kolb, (who then occupied the premises under a lease from Newman,) for a sale of the property to Kolb for \$10,000; of which Kolb was to pay \$4,000, in cash, and for the balance, give his two notes of \$3,000 each, secured by a mortgage of the premises, and payable with interest from 1st of January, 1867, at one and two years after date. Upon making the first payment, and the notes and mortgage, he was to receive a conveyance of the title from Newman. And, with a view to the execution of this contract, Newman, in November, 1866, had his deed of the plantation to Kolb, signed, sealed and acknowledged, in Virginia, and sent out to *Messrs. Shorter & Brother*, attorneys at Eufaula, to be delivered when Kolb should perform his part of the agreement. But before this was done, the appellant, McRae, bargained with Kolb to buy the same property from him at \$11,000; of which he was to pay \$8,000 in cash, and for the rest, give his note at one year, and receive a conveyance from Kolb and wife.

McRae paid \$5000 on the first of January, 1867, and \$2,000 more on the 4th. He also delivered his note to Kolb for \$3,340, the balance of the price and one year's interest; but when this was delivered, or what was its date, is not shown by any witness. And McRae received from Kolb possession of the premises, the deed of Newman to him, signed and acknowledged in November, 1866, and Kolb and wife's deed to him, McRae, dated December 28th, 1866, and acknowledged January 4th, 1867; but when these instruments were respectively delivered is a matter in dispute. The other \$1,000 of the cash payment of McRae to Kolb, was made "in corn and fodder and, perhaps, some money"; but when or by whom delivered, does not appear.

Two years after these transactions, and long after McRae had paid his \$11,000, in full, to Kolb, he learned from Newman that the latter had a mortgage on this same Fitzhugh Place, executed by Kolb as a security for his two notes of \$3,000 each, for the credit part of the price he was to pay Newman for it; and that a large part of this debt was still due. And it is to enforce payment of this balance, by a sale under the mortgage, that Newman filed the bill in this cause.

It is insisted for McRae that the deed of Kolb to him is older than Kolb's mortgage to Newman and takes precedence of it; and if not, that Newman is estopped from setting up his mortgage against defendant, McRae, because the latter bought the land without any suspicion of such an incumbrance, with the knowledge of *Eli S. Shorter*, the agent of

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Newman, and without any intimation from him of its existence, although if it existed, the mortgage was then in his possession.

First, in regard to the priorities, as mentioned above, Newman's deed to Kolb bears date and was acknowledged in November, 1866; and the deed from Kolb and wife to McRae bears date December 28th, 1866, and was acknowledged January 4th, 1867. The mortgage from Kolb to Newman bears date January 1st, 1867, and was attested by subscribing witnesses, but was never acknowledged at all before a magistrate. It was recorded March 7th, 1867. Such instruments, though, do not become operative always from their dates, nor at all, until delivered—that is, until the grantors part with their control over them with the intent that they shall go into effect.

When was Newman's deed to Kolb delivered? It is proved by entries on the books of Shorter & Brother and their testimony, and by the date of the draft, in which a large part of the first payment was made, that this deed was not delivered before the 7th of January, 1867. And Eli S. Shorter and Kolb testify that Newman's deed to him was delivered on that day. Confirmation of this is afforded by an entry of that date, upon the books of Shorter & Brother of a charge against Newman, for revenue stamps to be affixed to that deed. The evidence in opposition is very unsatisfactory. McRae, on this subject, does not testify of his own knowledge; for, he says Newman's deed was delivered to *his agent*, Kendall, before Kendall made the first payment for him, to Kolb; and that both it and Kolb's deed to him (McRae) were delivered to Kendall at that time. But McRae was not then in Eufaula where the transaction took place, and could not have personal knowledge of them. What testimony, then, have we on this subject? Kendall, in his second deposition, testifies that *according to his best recollection*, (which may be very confused and uncertain, after a lapse of six years,) he had Newman's deed to Kolb, and Kolb's deed to McRae, before he paid any money to McRae. And he and Locke satisfactorily prove, by reference to book-entries, that his first payment of \$5,000 was made to Kolb for McRae, January 1st, 1867, upon the order of McRae, and the second, of \$2,000, on the 4th. But Kendall says nothing of having given back to Kolb his deed to McRae for acknowledgment, as McRae says he did. It is also pretty certain that he was mistaken in supposing he then had, as agent for McRae, Newman's deed to Kolb. For it is quite clear that this was not delivered to Kolb before the 7th of January. And since it was upon McRae's order that Kendall paid for

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him the \$5,000 to Kolb, it was not necessary that Kendall should have the deed before making the payment. In his first deposition, he does not say he did have it. There appears indeed to have been great inattention on McRae's part in regard to the titles to the land, for he employed no attorney to guard his interests and advise him, and never even made any inquiries on the subject, of Shorter, through whom, as he knew, the conveyance from Newman was to come. We notice, also, that he did not have Kolb's deed to himself recorded until the 13th of June, 1867; and that of Newman to Kolb was not recorded until February 18th, 1869.

When, now, was the mortgage from Kolb to Newman, for a part of the purchase-money, delivered? It is dated January 1st, 1867, and attested by the two Shorters, and was left in their hands. But the written agreement between Kolb and Newman about the purchase, shows that the mortgage to Newman and the deed of Newman to Kolb, the mortgagor, were to be simultaneously delivered. Until this was done and the cash payment made, the papers remained *in escrow*, in Shorter & Brother's hands. The mortgage became operative only when the conveyance of the land, for the price of which it provided, was delivered. Until that time the mortgagor neither owned the land he mortgaged, nor owed the debt secured thereby; wherefore, it did not matter whether he had previously executed a deed of the land to McRae or not. This could not have precedence of the mortgage; because, the mortgagor never was able to convey the land, free from that incumbrance. The title remained in Newman until his deed was delivered, and by the mortgage, *eo instanti*, returned to him, so as to preclude the interposition of any title or right in any other person. It has often been held that such a transaction is one and entire, and that even a right of dower in the wife of the purchaser could not, in such a case, come in between the conveyance and the mortgage; for which reason her signature to the mortgage, or relinquishment of dower in the land mortgaged, is in such a case, wholly unnecessary.—*Boynton v. Sawyer*, 35 Ala. 500, and cases there cited.

No priority, therefore, arises in favor of McRae, because the deed to him bears an earlier date than that of the mortgage to Newman.

In regard to the supposed estoppel of Newman, whereby he should be precluded from insisting on his security in opposition to McRae, a *bona fide* purchaser from Kolb, the argument in support of it rests wholly on the circumstance, that the deed from Kolb to McRae is in the handwriting of Shorter, one of the attorneys of Newman. McRae says that

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knowing his handwriting, and that he was the agent of Newman to deliver the deed of the latter to Kolb, his confidence in Shorter, (who was the uncle of Kolb), led him to believe that Kolb had a good, unincumbered title. This is a very narrow basis on which to found so important a conclusion, as that Newman should, therefore, be barred of any right under the mortgage to him. Apart from Shorter's explanation of the circumstances under which he wrote the deed, and of the fact that it is not affirmatively shown that he was informed when or in what way McRae was to pay for the land, McRae does not himself say that he ever approached Shorter, or sent to make any inquiry of him, on the subject, or employed any one else to investigate the condition of the title—although he knew when and where he could obtain such information. We cannot charge the consequences of this carelessness on Newman, and deprive him of his vigilantly preserved rights, on the ground that his attorney did not seek out McRae to give him information which he did not himself take pains to apply for.

Let the decree of the Chancellor be affirmed.

Ex parte Brown.

Motion and Petition before Supreme Court for Mandamus.

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1. *Consolidation of suits concerning the same property, pending in same court.* Where two or more suits are pending in the same chancery court, asserting conflicting rights in the same property, and the facts of each case need to be ascertained before the rights of any can be definitely settled, they should be consolidated that they may be heard together; or, if that can not be done, the suit involving the more important questions ought to be first determined, and the hearing of the other stayed until such determination.

2. *Same; practice in disposing of such suits.*—The parties interested should call to the court's attention the order of disposing of such suits, by appropriate and timely motion. And though one of the cases precedes the other, the chancellor may, without partiality, decline to proceed with it until the other cases are brought to a hearing, if thereby injustice would be done other complainants.

3. *Prohibition; when does not lie.*—The writ of prohibition does not lie against a court or judge, except where there is no jurisdiction, or, there being jurisdiction for a particular purpose, where such jurisdiction is transcended.

4. *Same.*—Whether or not the statutory lien given in favor of the State to secure bonds endorsed under the internal improvement aid law, can operate in favor of a holder of such bonds, and entitle him to be subrogated to such lien, is a question that can be decided in no other than a chancery court, and if the chancellor commits error in a decree thereon, it is not to be revised or corrected by a writ of prohibition.

5. *Mandamus; supersedeas.*—Mandamus is not a revisory writ, and can not VOL. LVIII.

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be legally employed to prevent the execution of an erroneous decree; this is the office generally of a writ of supersedeas.

6. *Execution of decree; may be temporarily restrained.*—A chancellor may, upon application to him in a particular case, restrain, temporarily, the execution of his decree, until the determination of some matter to be affected by it shall be first obtained, when justice between the parties would be thus promoted. The fact, as in this case, that the property was in the hands of the court through its receiver, would be a good reason for fixing more lenient terms upon which such stay is granted.

7. *When and for what a party defendant may come in after final decree.* After final decree in a foreclosure suit by a mortgagee against the corporation, the court will not give a stockholder leave to become a party defendant, and allow him to make answer and defense; but he might be allowed to be made a party for the purpose of allowing him to prosecute an appeal.

HERNDON & SMITH, BROWN & HOGUE, SMITH & ROULAC, for
WILSON R. BROWN.

W. M. BROOKS, for D. LUDDINGTON.

MORGAN, LAPSLEY & NELSON, for N. B. FORREST.

No briefs came to Reporter.

MANNING, J.—Petitioner is a stockholder of The Selma, Marion and Memphis Railroad Company of Alabama; and his petition, and the exhibits thereto, represent that there was a corporation of the same name in Mississippi, and another of the same name in Tennessee; that proceedings were taken in March, 1871, by persons claiming authority to do so, to consolidate the three companies into one; which proceedings were legally ineffectual and invalid; that certain persons, who were at that time elected and appointed to constitute and be a board of directors and president and other officers of the consolidated company of the same name, had taken possession of the railroad and other property of the Alabama Company, and proceeded in the construction of its railroad and the conduct of its business, as part of the railroad property and business of such consolidated company, with a line of operations extending from Selma, Alabama, through the State of Mississippi, to Memphis, in Tennessee; that in the prosecution of this enterprise, said board of directors and the president (N. B. Forrest, of Memphis,) caused to be issued a large amount of bonds, and had undertaken to secure the payment of them by a mortgage trust deed of all the present and future property of said supposed consolidated company, executed to trustees; which mortgage and bonds, bearing date March 17, 1871, was called the "first mortgage" and "first mortgage bonds" of The Selma, Marion and Memphis Railroad Company, and were

[Ex parte Brown.]

outstanding in the hands of holders, who asserted, by virtue thereof, a mortgage lien upon the railroad and other property, which petitioner insists belong to the Alabama corporation alone. It further appears that there was issued, under date of September 1, 1869, a series of bonds of the company, to the amount of \$16,000 per mile of completed road, with the endorsement of the State of Alabama, purporting to be by authority of "an act to establish a system of internal improvements in the State of Alabama," approved February 19, 1867, and an act amendatory thereof, approved September 22, 1868, by which acts, called the "State aid law," it was provided that the State should have a first lien upon the railroad, and its appurtenances, of any company whose bonds the State should endorse, to indemnify it against loss; and that a large amount of these bonds were also outstanding, held by persons who asserted a right of recourse against the Alabama company and its property therefor.

The petition further sets out that certain judgment creditors of the Alabama company filed a bill—that of T. T. May and others, (February 8, 1875,) on behalf of themselves and other creditors, against each of the three State companies and the consolidated company aforesaid, and against N. B. Forrest, as holder of some of the bonds aforesaid, and other holders of such bonds,—in the chancery court of Perry county—to contest the validity of said supposed consolidation, and of the said first mortgage and first mortgage bonds, and of the State indorsed bonds,—alleging that the latter were illegally issued,—and denying that any of the bonds created a lien in favor of the holders upon the railroad property. The bill charges that the railroad company is insolvent, and prays that it be decreed that no lien exists in favor of the holders on its property, &c.; that the property be sold to pay debts of complainants, and that a receiver be appointed to take possession of and care of the property in the meantime. A receiver was appointed, upon the company having filed an answer acknowledging its insolvency and inability to proceed in the construction of the road. To this bill, Butterfield & Co. and others became parties defendant, answered and filed a cross-bill, setting up that they were owners of a large amount of the State endorsed bonds, claiming for them, under the statute, a first lien on the railroad property in favor of the State, and that they were, by subrogation, entitled to benefit of this lien to pay a large amount of past due coupons for interest on the bonds—and praying a sale of the property to pay them. It prayed also that Fawkes, the receiver, be continued in the meantime in possession of the property.

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Petitioner further shows that he, Wilson R. Brown, as stockholder of the Alabama company, on behalf of himself and all other stockholders, filed his bill in the same court March 21, 1876, against all the companies aforesaid, and against N. B. Forrest and others, as holder of first mortgage bonds, and Butterfield & Co. and others, as holders of State endorsed bonds, and other persons,—in which he also alleged that there had been no legal consolidation of the three State companies—that the first mortgage bonds were not valid against the Alabama company and property, and that the State endorsed bonds were illegally issued and created no lien on said property. He charged also that the holders of the bonds of both classes were scheming and combining to sell the road and property and get possession of it, to the detriment of other just creditors and the stockholders; that if this were prevented, all just debts could be paid, as stockholders desired; and that Fowlkes, the receiver, was managing the property advantageously; wherefore, he prayed continuance of the receiver; that the bonds and mortgage be declared void and cancelled; that it be decreed there was no lien for the endorsed bonds, and that it be ascertained who the just creditors are, and that they be paid, &c.

To this bill, too, Butterfield & Co. and others, filed answer and cross-bill, setting up their claims as holders of the State endorsed bonds.

The petition further alleges that, while these causes and cross-causes were pending, one D. Luddington, claiming to be holder of a large amount of the State endorsed bonds, including the same identical bonds of which Butterfield & Co. and others, in said causes, claimed to be holders, and which were obtained from them by Luddington, with full and positive knowledge of the litigation pending concerning the same, filed his bill for himself and other creditors, on the sixth of September, 1877, in the same chancery court of Perry county, against The Selma, Marion and Memphis Railroad Company of Alabama, as sole defendant, and therein averred that he was holder of over 400 of the 600 State endorsed bonds which that company had issued under the "State aid acts" aforesaid; that by said acts a lien was created in favor of the State on the railroad and other property and franchises of the company for the payment of the bonds and interest; that interest on said bonds, due by coupons, had accrued to a large amount, and neither the company nor the State had paid the same; and that by reason thereof complainant and other holders of said State endorsed bonds, were subrogated to the benefits of the lien created by the statute in behalf of the State. But the bill

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makes no mention of any consolidation of this corporation with those of other States, or of the execution of the mortgage and bonds aforesaid; or of the pendency of either of the other causes aforesaid, or of the fact that the railroad and property were in the hands of a receiver of the court in such causes, or any other cause. It alleges, though, the insolvency of the company, and prays for a sale of the railroad and other property of the company, and of its franchises, for the payment of the amount due on said State endorsed bonds, and for the appointment of a receiver.

Petitioner further complains that the person on whom this bill was served as president of the company, in order thereby to bring it into court, was not in fact president of the company, but had been elected and had acted as an officer of the supposed consolidated company, and insisted that it had been lawfully and properly constituted, and its acts were valid; that in consequence of his omission to do anything in the premises, no defense was made to the suit of Luddington; that a decree *pro confesso* was taken therein against the company immediately after the expiration of the thirty days allowed by law for answering the bill, all without the knowledge of or notice to petitioner; that at an early day of the next term of the court, which continued only a few days, and was held within a short time afterwards, and while the other causes aforesaid were pending in said court, the cause of Luddington was submitted to the court upon the decree *pro confesso* for a final decree; and that a decree was thereupon shortly afterwards rendered declaring the plaintiff entitled to relief, and ordering a sale of the railroad, other property and franchises of the said Selma, Marion and Memphis Railroad Company of Alabama, at a short day, without petitioner having had such notice, or knowledge of the proceedings as enabled him to be advised what course he ought to pursue, or how he should intervene to protect his interests; and that thereby the property is about to be disposed of and the proceeds distributed before the issues presented in the causes aforesaid can be determined.

He further complains that his petitions to the chancellor for a delay of the sale, until the decision of the court can be had in said causes, and that he be allowed to become a party defendant to the cause of Luddington, to enable him to bring the decree of the chancellor into this court by appeal, have been refused.

Wherefore, he prays a writ of *mandamus*, or some other process, from this court to the chancellor, to prevent the sale ordered, until the questions in the other causes be decided, or for other relief.

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Many other matters are embraced in the petition and the pleadings therein referred to, of which we take no notice* because they can not be considered on this motion.

We have omitted, also, reference to any matter on either side which relates simply to motives imputed or disclaimed, for the reason that in a proceeding of this sort we have nothing to do with the motives, real or supposed, of those concerned.

1. Where there are, in the same chancery court, two or more suits in which different creditors, or creditors and others, severally claim interests adversely to each other in the same property, and the facts upon which the rights of each depend need to be investigated, before the rights of any can be definitely settled, there should be, ordinarily, a consolidation of the causes when that is possible, to the end that they may be heard and decided together, or if that can not be effected, one or more of them should be stayed until a determination shall be reached in another, or to the others. And when such a stay is ordered, the cases involving the more important questions upon the determination of which the rights of the respective contestants chiefly depend, ought to be first considered.—1 Dan. Ch. Pl. & Pr. 4 ed. 797-8.

The property involved in these controversies was already in the possession of the court, by its receiver appointed in one of the other cases, to abide the decree of the chancellor in it, and the question of the validity of the bonds belonging to the class of those of which Luddington was the holder, and of the existence or not of a lien on the property, was put in issue therein. Ordinarily, therefore, those causes, or one of them, ought to have been first heard. As was said by Lord Chancellor REDESDALE, in an interesting case concerning the practice in equity: "It is much more important to attend to the general administration of justice in this court, than to the interests of any particular parties." *Largan v. Bowen*, 1 Sch. & Lef. 298.

2. These matters of practice, are generally decided upon motions made by the parties in interest, whose duty it is to call the attention of the chancellor in due time to them. Though if it appear that the other parties concerned were taken by surprise, and equity required a fuller investigation than could be had in the suit before him, it could not be regarded as evincing any lack of impartiality in the chancellor if he declined to proceed in that suit, even after it was submitted, until the others could, by due diligence, be brought to a hearing. The principle is something like that of a case in which it is found that other parties ought to be made to a suit to enable the court to settle all the equities,

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in which event it refuses to proceed until they are brought in.

We have explained only what is the proper practice in a case supposed. In the present instance, no motion was made on behalf of petitioner for a consolidation of causes, or stay in any; and the chancellor proceeded to render his decree in the Luddington suit, announcing what it would be on the day after submission of the cause, and putting it in form several days afterwards. Whether any one is to blame for the decision of this case in advance of the others, and if so, who? are questions with which, on this motion, we have nothing to do. A decree of the court has been rendered, deciding that Luddington was entitled to the relief he prayed for, ordering a sale of the railroad and all other property of the company, and its franchises, and ordering an account to be taken of the debts with which it is chargeable. The question for us to decide is, whether or not petitioner is entitled to the relief he prays in avoidance of this decree.

3-4. The writ of prohibition, which has been asked for, is granted against a court or the judge thereof, only to prohibit its proceeding in a matter of which it has no jurisdiction—that is, when the cognizance of it is drawn from the tribunal to which it belongs, *ad aliud examen*, or, when the court having jurisdiction for a particular purpose, transcends the limits by which it is circumscribed. In the present instance, it has been argued that the statutory lien in favor of the State could not operate in favor of Luddington, or that he was not entitled to assert it, and that the chancellor had, therefore, no jurisdiction. But whether Luddington was entitled to be subrogated to the lien of the State was one of the questions in the case, and a question which could be judicially decided in no other than a chancery court. It was a proper subject of inquiry in that forum only. And if the chancellor committed error in his decree, it is not to be revised or corrected by a writ of prohibition.

5. For like reasons, it is not a proper case for the writ of *mandamus*. This is not a revisory writ, nor can it be legally employed to prevent the execution of a decree which is complained of as erroneous. This is the office, generally, of a writ of *supersedeas*; which is to be obtained in the mode pointed out by law.

6. It is not, however, beyond the power of a chancellor, upon application to him in a proper case, to restrain, temporarily, the execution of his decree until the determination of some matter to be affected by it shall be first obtained, when justice between the parties would be thus promoted. Of course, the fact that the property is in the hands of the court, would be a good reason why the terms upon which

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such a stay is granted should not be so onerous as to prevent relief.

7. The chancery court having jurisdiction of the matter, and having rendered a decree in the cause, the question of error or not in the decree can be considered by this court only upon an appeal to it. And if the decree be interlocutory only, as was said of the decree for Luddington, on one side or the other in argument at the bar, application for a reconsideration of it should be first made to the chancellor.

It is erroneously set forth in the petition, that petitioner had made application to the chancellor to be made a party to the cause of Luddington against the company to enable him to appeal from the decree. The application really made after decree rendered, was for an order by which petitioner should be made a party defendant to the cause, and to file an answer and make defense in the court below; which application was properly denied by the chancellor. This could not be done after a final decree, and the expiration of the term. *Ex parte Branch & Sons*, 53 Ala. 140.

The motion of petitioner must be overruled; the former order of this court restraining the sale be set aside, and the petition be dismissed at the costs of petitioner.

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Action against Lessee of a Saw-mill for Damages, under an alleged Breach of Contract.

1. *Breach of contract by lessee of saw-mill; measure of damages; erroneous charge.*—The measure of damages in a suit by a mill owner against one to whom he had leased it, upon defendant's agreement to run it at his own expense, and pay one-fourth of the lumber sawed—the breaches alleged being the failure to run the mill at its capacity, and allowing it to remain idle for some time, and injuring it by unskillful and negligent use, etc.; the injury which results proximately from the breaches; and the facts being ascertained, the law, and not the contemplation of the parties, fixes the measure of damages; hence, it is error to charge the jury, in such a case, that "the damages must be such as both parties reasonably contemplated at the time of making the contract."

2. *Charge to jury; when calculated to mislead.*—When the complaint contains a count for the breach of the contract of renting a saw mill, and also the common counts, the proof showing the contract of renting, and also a sale of oxen, a charge that "in this action the plaintiff, if entitled to recover at all, must recover on the contract," is, without more, calculated to mislead; it should be confined to the recovery upon the breach of the contract of rent; for payment for the oxen could be recovered under the common counts.

3. *Conflicting testimony; when case not made out by plaintiff; what a proper charge.*—In such a case, where damages are sought to be recovered for injuries

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to the mill, by reason of its negligent and unskilful use by defendant (two witnesses testifying on this point), it is not error to charge the jury that "if one witness swears the mill was damaged more than by ordinary wear and tear, and the other swears it was not, and both witnesses are of equal credibility, and the jury considers them equally credible, then plaintiff has not made out his case on the question of damaging the mill."

4. *Witnesses; what necessary to make them equally credible.*—Witnesses, to be "equally credible," must have the same measure of intelligence, honesty, means of knowledge, and absence of bias.

APPEAL from the City Court of Lee.

Tried before the Hon. JOHN C. MEADORS.

Action was brought by Terry Collins, appellant, against Thomas J. Stephens, appellee.

The complaint contained five counts; the first and second counts being for damages to the mill leased and for breach of an agreement to run the mill at defendant's expense, and pay one-fourth of the lumber sawed; the third, for goods, wares and merchandize; the fourth, for money paid by request; and the fifth, for money due by account stated.

The defendant pleaded in short the general issue; performance of contract, and a set-off.

The plaintiff testified that he entered into a parol contract with defendant, by which defendant was to take possession of the plaintiff's steam saw-mill, and to run the same at his own expense, and to give the plaintiff one-fourth of all the lumber cut by so operating the mill—the plaintiff to keep the machinery in repair. Several witnesses testified that the contract was to be terminated by Stephens, on giving twenty days notice to plaintiff. Several others swore that it was to be terminated at the option of either party. It was in evidence that Stephens sent Collins a written notice, dated September 2d, 1873, that he would terminate said contract in twenty days. Collins also swore that he was to let Stephens have a yoke of oxen at \$65, for which he had only received \$30 in lumber. Stephens swore that the price of the oxen was \$60, and that they had been paid for in lumber.

It was proved that Stephens abandoned the mill on the 20th of September, and several witnesses testified that, on said last day, plaintiff's son, who was living with plaintiff, took possession of the mill; but the plaintiff, in rebuttal, swore that his son had no authority to do so. As to the damage done the mill, the evidence was conflicting—one witness swearing one way and another witness testifying to the opposite.

There was other evidence which, from the view of the case taken by this court, need not be here noticed.

After the evidence had closed the court gave several charges, at the request of defendant, in writing, among which were the

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following: "2d. If the plaintiff is entitled to recover in this action at all, he must recover on the contract." "9th. That the plaintiff must make out his case, in every particular, before the defendant is called on to say a word." "12th. That if only one witness swears the mill was damaged more than ordinary, and one witness swears it was not, and both witnesses are of equal credibility, and the jury considers them equally credible, then the plaintiff has not made out his case." "13th. The damages must be such as both parties reasonably contemplated at the time of making the contract." To the giving of each of said charges the plaintiff excepted, and now assigns the same as error.

W. H. BARNES & SON, for appellant. (No brief came to Reporter.)

H. C. LINDSEY, *contra*.—1. The second charge was properly given. The bill of exceptions sets out all of the evidence, and there is no proof bearing upon the common counts in the complaint. All the evidence was upon the contract.

2d. The 12th charge was not erroneous. The witnesses swore positively; and the quality of credibility included knowledge, capacity, opportunity, the absence of either of which qualities would impair credibility.

3. The 13th charge was correct.

STONE. J.—The 13th charge asked should not have been given. The measure of damages in a suit for the breach of a contract, such as that described in the complaint, is the injury which results proximately from the breach. And whether the parties, at the making of the contract, contemplated, or had in view the damages to result from a breach of such contract, or not, does not, in the least, vary the question, or the measure of recovery. The facts being ascertained, the law, and not the *contemplation of the parties*, declares the measure of damages.

The testimony tends to show there were two contracts—one a lease of the mill, and the other a sale of oxen. Payment for the oxen, if not previously made, could have been coerced under the common counts found in the complaint. In this view, the second charge was somewhat calculated to mislead, and should have been confined to the special count. For the same reason, the ninth charge, without explanation, was calculated to mislead.

To be "equally credible," witnesses must have the same measure of intelligence, honesty, means of knowledge, and ab-

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sence of bias. There was no error in giving the twelfth charge.

We find no other errors in the rulings of the City Court.
Reversed and remanded.

Perry County v. Selma, Marion & Memphis Railroad Company.

Petition Praying the Court to Authorize Receiver to pay said County certain back Taxes, and application for Re-hearing.

Western Railroad Company v. Chambers County.

Bill in Equity to Enjoin Collection of Taxes.

Savannah & Memphis Railroad Company v. Weaver, Tax Collector, et al.

Bill in Equity to Enjoin Collection of Taxes.

1. *Interpretation of Constitution as to enacting statutes; rule.*—The only safe rule for interpreting clauses of the Constitution, which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold, when it is affirmatively shown by legal evidence, that, in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law.

2. *Same; presumption as to entries in journals of legislature.*—Except as to those matters which the Constitution declares shall appear on the journal, the rule is to infer everything was rightly done, unless the journal shows affirmatively that some constitutional demand was disregarded. The presumption, in the absence of proof, is always in favor of official propriety.

3. *Same; bill for raising revenue, what is; must originate in the House; act approved February 1870 declared unconstitutional.*—The bill to be entitled an act "To amend an act entitled an act to establish revenue laws for the State of Alabama," approved Feb. 9th, 1870, was a bill for "raising revenue." within the meaning of the Constitution of 1868 (art. 10, § 15), which must originate in the House of Representatives; and it affirmatively appearing from the journals that said bill originated in the Senate, it is therefore declared unconstitutional and void. (MANNING, J.—of the opinion that the question as to

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whether the bill was properly introduced in the Senate first, was a question for the legislature and not for the courts.

4. *Bill for raising revenue; definition; what included.*—A bill for raising revenue, as termed in the Constitution, is a bill providing for the levy of taxes as a means of collecting revenue—hence, a bill for *reducing taxation*, if it provides for collecting revenue, is still a bill for “raising revenue.”

5. *Revenue law of 1868; two distinct systems provided; assessments by auditor and assessor.*—Under the revenue act of 1868, two distinct systems of assessment are provided; one of general subjects of taxation, which is required to be made by the assessor; the other, of railroads and their rolling stock, which duty was cast on the auditor. There has been no law since before December 31st, 1868, which authorized the tax assessor or collector to assess railroads or their rolling stock.

6. *Same; no provision for county taxes; levy of county taxes.*—Under said act there is no such thing as an assessment of property for county taxes; the assessment is for State taxation alone. But after equalization of the assessment by the county board, the court of county commissioners levy a tax on the State assessments to provide for county expenses. State taxes are assessed, county taxes are only levied.

7. *Assessment necessary before collection of taxes.*—There must be an assessment, either pursuant to or adopted as a basis of the levy, before there can be a lawful collection of taxes.

8. *Escaped taxes; what are not; power to assess.*—In the acts of 1868, and 1875, “to establish revenue laws for the State of Alabama,” are clauses which empower the assessor and collector, in certain conditions, to assess property which had escaped assessment during previous years; but those clauses give no authority to such officers in the cases under discussion, because, 1st, this is not property which has escaped assessment—these railroads having been assessed each year for State taxes; 2d, the assessor had no authority to assess railroads or their rolling stock, and hence it cannot be affirmed that they have escaped the assessor,—the auditor was the assessor and they had not escaped him; 3d, as there is no authority to assess any property for county taxes, and the railroads were assessed for State taxes, they did not escape any assessment which the law authorized to be made.

9. *Commissioners' court; no power to levy on railroads for escaped taxes.*—The court of county commissioners has no authority to levy taxes on railroad property, which has escaped them during previous years; such authority can only exist by statute, and the statute has not conferred it.

10. *Instructions by auditor to county officers; what not binding; liability of railroad for back taxes.*—Under the act approved Feb. 9th, 1870, above declared unconstitutional, the auditor instructed the tax collector of Perry county not to collect of the railroad company the county taxes for the year 1869, whereupon the tax collector did not collect such taxes; held, not to be an instruction as to any matter arising under the revenue law of 1868, and hence not binding on the county officer; and the railroad company is liable to pay the county tax levied for the year 1869.

11. *Provision of revenue law of 1875; what merely directory.*—Section 93 of the revenue law of 1875 providing that the county tax be levied in July, is merely directory, and such a levy made at the regular August term of the court of county commissioners is valid.

[HEAD NOTES TO THE OPINION ON PETITION FOR RE-HEARING]

12. *Back taxes collectable; legal liability of tax-payer; when enforced by common law action.*—Taxes may be collected, under our statutes, after the expiration of the tax year in which they are assessed. The levy and assessment creates a legal liability on the tax-payer to pay, which, according to a preponderance of authorities, may be enforced by an action at common law, unless the statutes provide an exclusive remedy.

13. *Duty of tax collector as to back taxes; limitation.*—It is the duty of the tax collector to ascertain and collect delinquent taxes assessed for precedent years, and this duty is limited by the acts of 1876-7, (now § 421 of the Code,)

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to the extent that he reports insolvencies which are so allowed by the court of county commissioners, and these cannot be collected.

14. *Limitation barring suit by county, for taxes.*—A county is not exempt from the operation of statutes of limitation; but there is no such statute or provision applicable to a claim for taxes due, and there is no bar to such action short of the presumption of payment after the lapse of twenty years.

15. *What acquiescence no bar to claim.*—That the commissioners' court acquiesced in the unconstitutional act of 1870, *supra*, (which remitted certain taxes assessed against the railroad company) by not requiring the tax collector to collect or account for the said company's tax the previous year, is no surrender of the claim, or bar to its present assertion.

PERRY COUNTY V. THE SELMA, MARION & MEMPHIS R. R. CO.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. CHARLES TURNER.

This case was decided upon demurrers to a petition which averred in substance as follows: That in the year 1869, the president and secretary of said company, in accordance with the provisions of section 24 of the Revenue Law of Alabama, approved December 31st, 1868, made and returned to the auditor of the State of Alabama, a statement, as required by said section, that said company had 20½ miles of main and side track in said county, the total value of which was \$184,500, and also, a statement of rolling stock, valued at \$18,015, which the auditor apportioned to said county, of which, together with the value of the track, said auditor notified the assessor of Perry county, and thereupon said company was, for the tax year 1879, assessed on the total sum a State tax of $\frac{3}{4}$ of 1 per cent.; that the commissioner's court of said county did proceed, levy, and assess on the 19th day of August, 1869, for county purposes, a tax of 85 per cent. of the State tax assessed upon all of the said taxable property of said company; but said tax was never collected, because the legislature, by an act, approved February 9th, 1870, attempted to so amend said section 24 of the said revenue law of 1868 as to exempt said property from taxation for county purposes; that said act of February 9th, 1870, was in violation of the Constitution of Alabama, then in force, and was utterly void, and that said company was, and is now, legally and justly indebted to said county in the sum of \$1,291.03 for the tax of the year 1869, for the payment of which a paramount lien was given by section 14 of said revenue law; that a similar tax became due and payable from said company for and during the years 1870, 1871, 1872, 1873, and 1874, but which was never assessed or paid, and is still due. The prayer of the petition is for an order and decree directing and requiring the receiver, Alpheus M. Fowlkes, to pay the amount of said tax due for the year 1869, out of any money belonging to said company in his hands,

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or, in default thereof, the enforcement of said lien by a proper decree; and, as to the said taxes due for the years 1870, 1871, 1872, 1873, and 1874, it is prayed that a proper decree be rendered establishing the same, and that said receiver be ordered to pay the same to petitioner; and other orders and decrees necessary to establish the rights of petitioner.

For grounds of demurrer to said petition, the said railroad company assigned the following:

1. That it does not appear by said petition, and by reference to the acts of the legislature therein cited, that the petitioner is entitled to have and collect the taxes mentioned in the petition, the same not being warranted by any law of Alabama.

2. It does appear by said petition that petitioner has no right to collect the tax alleged to be due from the said defendant, and for further causes of demurrer, the following were subsequently stated:

1. That it appears from said petition that the tax levied in said county as county taxes for the year 1869, was released by the legislature of the State of Alabama, and it appears from said petition that none of the taxes claimed in said petition, except for the year 1869, were ever assessed.

2. That it appears from said petition that no part of the taxes claimed in said petition was ever legally assessed.

3. That it does not appear from said petition that said petitioner has any legal right to the taxes claimed therein.

4. That the said county of Perry, in the said petition, does not show any power or authority in the said county to levy and assess the taxes claimed in said petition.

The Chancellor sustained the demurrer and dismissed the petition at the cost of the county.

The appellant, Perry county, now assigns said decree as error.

WESTERN RAILROAD OF ALABAMA V. CHAMBERS COUNTY.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. N. S. GRAHAM.

Complainants in this case, the said railroad company, filed their bill the 15th of March, 1876, alleging, among other things, that the said county of Chambers, through its court of county commissioners and tax assessor and collector, has attempted to assess and levy a county tax for the year 1875, on that part of complainant's road-bed, main and side track, situated in said county, and that said county is now proceeding by and through its tax collector, Julius G. Weaver, to collect said tax by a levy upon property of complainant, loca-

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ted in said county; that the amount of said tax claimed is \$1,033.64, that said county also levied for and in behalf of the State of Alabama, \$838.90, which amount complainant has paid in full. Complainant further avers that the only notice of apportionment issued by the auditor with regard to said railroad tax for 1875, was the following:

STATE OF ALABAMA, AUDITOR'S OFFICE, }
Montgomery, Ala., August 13, 1875. }

Tax Assessor of Chambers County:

SIR: The following valuation of railroad property is furnished for your guidance in compliance of section 21, Revenue Laws:

Western Railroad.	Value.
14 miles main and side track.....	\$83,700 00
Proportionate value of rolling stock	20,164 20
Total value.....	\$103,864 20

This assessment is made under the revenue laws of 1868, and apportioned to counties for collection under the revenue law of 1874-5, in compliance with the provisions of an act "to continue in force certain parts of the revenue laws," &c., approved March 10, 1875.

No assessment can be made on above property for county purposes for the present year.

(Signed)

R. T. SMITH,

Auditor and Chairman of Board of Equalization.

By M. L. W.

Complainant further avers that said tax amounts to 1 per cent. on the value of the property when it should not exceed one-half of one per cent., which complainant is willing to pay, &c. And complainant further avers that the commissioners' court of said county did not levy the tax for county purposes at their July term for 1875, but all the action was taken at their August term for said year, &c. The bill concludes with a prayer to perpetually enjoin the collection of said tax, and for general relief.

Respondents, in their answer, state, among other things, not necessary to be here noticed, that a tax of one-half of one per cent. was levied for county purposes under the general revenue laws, and an additional tax of one-half of one per cent. for the purpose of paying and redeeming the bonds of said county, issued under an act approved Feb. 7th, 1870, as amended Feb. 24th, 1872, which act authorized such additional levy; and that the taxes for county purposes were levied at a regular August term, 1875, of said court of county

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commissioners. The respondents also interposed several demurrers as follows :

1st. That there is no equity in the bill.

2d. The bill fails to show that said taxes were illegally assessed and levied, and that the amount therein stated as due the respondent, Chambers county, is not legally due.

3d. The facts stated in the bill show that the property of the railroad company was liable for county taxes in the county of Chambers.

The record also shows an agreement of facts submitted by counsel, showing the value of the property of said company, as returned to the auditor by the president and secretary, or fixed by the board of equalization; and other matters, not necessary, under the view taken of this case, to be here stated.

The Chancellor rendered his final decree dismissing the complainant's bill, and refusing the injunction prayed—which decree is now assigned as error.

SAVANNAH & MEMPHIS RAILROAD COMPANY V. WEAVER, TAX COLLECTOR, ET AL.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. N. S. GRAHAM.

This case involves several of the questions contained in the other two cases, the facts differing so immaterially that they need not be stated. The bill prays for a writ of injunction restraining said tax collector from collecting county taxes of said railroad company for the year 1875. The Chancellor dismissed the bill with costs, and refused the injunction. The decree is now assigned as error.

JAS. E. WEBB, with whom was A. C. HOWZE, for Perry county.—1. Did sec. 120 of the revenue law of December 31, 1868, confer any judicial power on the auditor? The jurisdiction to construe a law exclusively belongs to the judicial department.—*Ala. Ins. & Trust Co. v. Boykin*, 38 Ala. 573; *Cooley's Const. Lim.* pp. 90, 91. The auditor is a member of the executive department.—Sec. 1, art. 5, Const. 1868. Section 2, article 3 of the said Constitution, expressly prohibits any person of the executive department from exercising any power properly belonging to the judiciary.

2. If there was a valid levy and a valid assessment during the years 1870 to 1874, then there is no impediment in the way of the counties now, by the aid of a court of equity, to enforce the lien created by section 14 of the act approved December 31st, 1868.—See *Hine v. Commissioners*, 17 Wall. ; *Eschoack v. Pitts*, 6 Mo. 71 ; 3 Otto, 428.

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3. The failure of the auditor to pro-rate the value assessed by him upon the rolling stock, cannot defeat the Constitution and law, both of which demand uniformity of taxation. Section 24 of the act of 1868 conferred power on the auditor to apportion the value of the rolling stock. The value of the road-bed, side and main tracks is returned by the railroad company to the auditor. The assessment was complete when the auditor listed and fixed a valuation upon the property.—Cooley on Taxation, 258; Hilliard on Taxation, p. 290, § 2.

4. If the act of 1870 never became a law, then there is no statute authorizing the auditor to collect from the railroads any tax. Therefore, whilst they did not escape *assessment* they escaped *taxation*, both for State and county purposes, in the previous assessments of 1870 to 1874, and are, therefore, excluded within the broad language of section 392 of the Code.

5. The lien for taxes over-rides all other liens and is not extinguished by delay in its enforcement.—Cooley on Taxation, p. 306; *Swan v. Knoxville*, 11 Humph. 130, 132; *Holdon v. Euton*, 7 Pick. 15; *Eschoack v. Pitts*, 6 Mo. 71. And a change in the ownership will not affect such a lien.—*Oldham v. Jones*, 4 B. Mon. 458, 465; *Covington v. Boyle*, 6 Bush, 204. See as to such lien authorities cited in Cooley on Tax. p. 205-6. Notwithstanding the repeal of the revenue law of 1868, the right to collect these taxes, which were assessed and levied in accordance with it, are expressly preserved by the proviso to sec. 4, of chap. 11 of the act, approved March 6th, 1876, and by sec. 10 of the Code.

W. M. BROOKS, *contra*; and JNO. F. VARY, on petition for rehearing.—1. The court of county commissioners had full power and authority to determine whether or not the claim of the county for these taxes for the year 1869 should be relinquished, and the tax collector be credited for the amount of the same.—*Lehman, Durr & Co. v. Robinson*, present term. And on account of such relinquishment the county lost its lien, and there is no way to reacquire it.

2. See the case of the *Mobile and Girard R. R. Co. v. Peebles*, 47 Ala. 317.

3. The county of Perry had no right to come into a court of chancery, at least until it had exhausted the remedies given by the statute to collect taxes—this had not been done. By all means, to entitle said county to come into chancery by its petition to collect the taxes for 1869, it must show by a statement of facts that it has a lien. It must show that it never acquiesced in the act of February 9, 1870. It must show that it never, by the action of its county commissioners

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court, or otherwise, relinquished its claim to said taxes—all of which the petition fails to show.

GEO. P. HARRISON and WATTS & SONS, for the Western Railroad Co.—1. The Chancery Court has power to grant injunction to restrain the collection of taxes when they are illegal, or when the tax collector is insolvent, and irreparable injury would result from the seizure and sale of the property. See *Warring v. Mayer, &c.*, 41 Ala.; *Lott v. Ross & Co.*, 38 Ala. 156; *Lyon v. Hunt*, 11 Ala.; *Thomas v. James*, 32 Ala. 723; *Cooley on Taxation*, 540, 541, 548, 536, 538-9; *Lott v. Hinson*, 40 Ala.; *Lott v. Mobile Trade Co.*, 43 Ala. 578. And the facts set forth in the bill show each of these essentials to chancery court jurisdiction.

2. The act of the ninth of February, 1870, provides that the tax on railroads shall be for State purposes only, and this act was so construed and held to be constitutional in the *M. & G. R. R. Co. v. Peebles*, 47 Ala. 317. This law was in force during the year 1875, and the railroad company was not liable for county taxes that year.

3. Taxes, to be valid, must be assessed by the proper person and at the time prescribed by law.—See *Cooley on Taxation*, 217 and notes. In this case, under the revenue act of 1875, the law required the assessment of the county tax to be made at the July term of the commissioners court, while the answer to the bill admits that the assessment of this railroad tax was not made until the August term of said court; and such assessment was, therefore, illegal.

4. The legal effect of the act of the 19th of March, 1875, is to suspend the operation of the general revenue law for that year, except as to the collection of taxes. The auditor so certified to the Chambers county assessor, at least so far as railroads are concerned. This leaves the commissioners court of Chambers county without authority to assess the appellant for 1875. The State taxes for that year were paid.

5. It is contended by appellees' counsel that the "act to empower the county of Chambers to issue bonds," &c., (see Acts 1869-70, p. 78,) and the amendment thereto (see Acts 1871-2, p. 363,) operate to allow the assessment in this case. This act does not undertake to declare on what property this special tax shall be levied, and in the absence of such provision, the county could not levy on property which, by the general law, is exempt from the payment of county taxes.

6. It is said by the counsel for appellee that the act of the 19th of March, 1875, can not have the effect of repealing the act of the 20th of February, 1875, because the latter is a special act, and the former general, and that the rule is

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that general laws do not repeal special acts, unless the special act be named. This is not the correct statement of the principle. The general rule is that "a subsequent law, if inconsistent with a former one, always repeals the former, unless the former is expressly excepted; and it makes no difference that the former is a special law."—See Smith's Com. on Stats. § 788 n., p. 905; also, pp. 897–8, § 777; Sedgwick on Stat. & Const. Law, 124. The cases of *Daughdrill v. Ala. L. & Ins. Trust Co.* 31 Ala. 91, and *Mobile & Ohio R. R. Co. v. The State*, 29 Ala. 573, are not inconsistent with these views.

J. J. ROBINSON, *contra*.—1. It may be laid down as a general rule (says High on Injunctions, p. 194,) that equity will not interfere to restrain a tax which is illegal or void, *merely because of its illegality*, but there must be some special circumstances attending the injury threatened, to distinguish it from a mere trespass, and, this being the case, within some recognized need of equity jurisprudence; otherwise, the person aggrieved will be left to his remedy at law." Citing *Daws v. Chicago*, 11 Wall. 108; *Heywood v. Buffalo*, 14 N. Y. 534, and other authorities.—See, also, Cooley on Taxation, p. 536; *Eve v. The State*, 21 Geo. 50; *Cody v. Lunard*, 45 Geo. 85; *Mechanic's, &c. Bank v. Debolt*, 1 Ohio St. 591; *Exchange, etc. v. Hines*, 3 Ohio St. 1; *Chicago, etc. v. —*, 22 Ill. 34; *LeRoy v. New York*, 4 John. Ch. 352; *Moore v. Medley*, 6 Johns. Ch. 28; *Kilbound v. St. John*, 59 N. Y. 21.

2. When the act, approved February 20, 1875, to repeal the act approved February 9, 1870, so far as the same relates to Chambers, Tallapoosa, Lee and Barbour counties, became a law, its legal effect was to restore to those counties section 24 of the act approved December 31, 1868, and said section 24 being so restored, it was as effectual for the present purpose, as if it never had been repealed.—See *M. & O. R. R. Co. v. The State*, 29 Ala. 573; *Rawles v. Kennedy*, 23 Ala. 240; *Pearce v. Bank of Mobile*, 33 Ala. 693.

3. Is it correct that the failure, from any cause, of the commissioners to levy the tax, for county purposes, on the second Monday in July, avoids the levy made on the second Monday in August following, at a regular term of said court? If so, it is apparent that county revenues must, occasionally at least, in our county, depend upon the condition of "bridges and high water," to enable a quorum of the court to reach the office of the probate judge promptly on the day named. If such levy is void as to complainants, it is void as to every tax-payer in the county. The only case that I have been able to find on the subject, is *Weaver v. The State*,
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39 Ala. 539, where the court failed to decide this precise point, "leaving it open and undecided." The case of *Wightman v. Kassue*, 20 Ala. 446, cited by the other side, does not reach this case. That was where a claim was audited and allowed at a *special* term, while these proceedings were had at a *regular* term of the commissioners court, named by law. There is nothing in such act of said court that resembles judicial proceedings. Again, in the language of Mr. Cooley, "When the illegalities complained of affect only the person complaining, an injunction which restrains the collection as to him, may very properly be awarded, if a sufficient case is made out, there being no considerable mischief thereby; but when they affect the whole tax levy (as in this case), a court should be extremely cautious in awarding on the complaint of one person, a process which may reach the case of others not complaining, and which may seriously embarrass all the operations of government depending on the sources of revenue, which by means of it would be stopped."

4. The act of February 9, 1870, exempting railroads from the payment of county taxes, is unconstitutional.—See argument of Stone & Clopton in case of *Mobile & Girard R. R. Co. v. Peebles*, 47 Ala. 323.

W. H. BARNES, for the Savannah & Memphis R. R. Co.
(No brief came to Reporter.)

J. J. Robinson, *contra*, filed the same brief, in this case, as in the case of *Western R. R. v. Chambers County*,—which brief is above condensed.

STONE, J.—Section 15 of article 4 of the Constitution of 1868, ordains "that all bills for raising revenue shall originate in the house of representatives, but the senate may amend or reject them as other bills." Substantially the same provision is found in all our constitutions, from that of 1819 to the last one in 1875. It has been suggested that this is a mere rule for the legislature, a disregard of which does not invalidate the law. It is known to the profession that this rule was adopted from the British constitution; and that it was engrafted thereon, because the House of Commons, in their Parliament, is the only popular department of their government, chosen by the people, and directly accountable to them. In that country, unlike the rule with us, it is the rule that the House of Lords can make no amendment of such bills, but must take them, without amendment, as they leave the House of Commons. This rule is guarded with sedulous care, and is treasured as fundamental, in the pres-

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ervation of the subject's goods from unreasonable assessment and spoliation.

With us the reason of the rule does not exist to the extent it does there, for each house of the legislature is elected by the people for a short term, and each is alike accountable to the popular will. But whether there be a reason for its maintenance or not, it has been a canon of the Federal Constitution from the date of its adoption, and of the Constitution of this State from the time of its birth. A rule thus sanctioned and preserved—thus imbedded in the very marrow of our system—we feel not at liberty to disregard. We adopt, as our own, the language of one of the soundest and most thorough thinkers and jurists, who have written on the subject of organic law, embodied in our constitutions:

“The courts tread upon very dangerous ground when they venture to apply the rules, which distinguish directory and mandatory statutes, to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all the departments of the government must at all times shape their conduct. . . . We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in our instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate, as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only.”—Cooley Const. Lim. 78.

We think the only safe rule for interpreting clauses of the Constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that when it is affirmatively shown by legal evidence that in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law. We do not mean to be understood as affirming that in all cases the silence of the journal proves some constitutional requirement was omitted. It is only when the Constitution requires that certain things shall be spread on

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the journal, that its silence affects the constitutionality. The presumption, in the absence of proof, is always in favor of official propriety; and, except as to those matters which the constitution declares shall appear on the journal, the rule is to infer everything was rightly done, unless the journal shows affirmatively that some constitutional command was disregarded.—See *State ex rel v. Buckley*, 54 Ala. 599; *State ex rel v. Morrow*, at present term; Cooley Const. Lim. 139.

We have not been able to find any direct judicial determination of the question, how far a disregard of the clause of the Constitution, copied in the opening of this opinion, affects the validity of a statute enacted to raise revenue. In *Harper v. Commissioners of Elberton*, 23 Geo. 566, it was conceded, rather than decided, that such act would be unconstitutional. A controversy arose on this question between the two houses of the 42nd Congress, but it resulted in no practical solution.—See note to section 880, 1 Sto. on Const. 4th ed.

The bill to be entitled an act "To amend an act entitled an act to establish revenue laws for the State of Alabama," and which is published as a law approved February 9, 1870,—Pamph. Acts, 87—originated in the Senate, as is shown by the journals of that session. We have carefully examined the journals, and can safely say this is affirmatively shown. The question arises, was this a bill for 'raising revenue' within the meaning of the Constitution? It is clear to our minds that increase of revenue is not implied in the language to 'raise revenue.' The transitive verb, 'to raise,' in this connection, means, "to bring together, to collect, to levy, to get together for use or service; as to raise money, troops, and the like."—Webst. Dictionary. The precise meaning in this clause is, to levy a tax, as a means of collecting revenue. See *Harper v. Commissioners of Elberton*, *supra*.

The act in question, in one sense, reduced the taxes; for it assumed to relieve certain railroad property from county taxation. But it was, nevertheless, a bill to raise revenue. It assumed to repeal section 24 of the revenue law of 1868; levied a tax for State purposes on the right of way, road bed, side-track, main-track, locomotive engines, passenger, freight, platform, construction and other cars, of all railroads in this State, and constituted the auditor both assessor and collector of this tax. If the bill became a law, the repeal of said section 24 of the act of 1868, effected thereby, left its own provisions as the only levy of a tax on railroads and their rolling-stock, and the only authority for assessing and collecting such tax; for, by such repeal, said section 24 of

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the act of 1868 ceased to exist. It also made provision for the assessment, by the county assessor, of other property of railroad companies, not enumerated above, that had its situs in the county; and changed the time when such tax should become delinquent. These provisions clearly show that the law we are considering was one to raise revenue; and as the bill originated in the Senate, it is unconstitutional, and never had a legal existence. We must, therefore, dispose of these cases, as if that statute had never been attempted to be enacted.

The act "To establish revenue laws for the State of Alabama," approved December 31, 1868—Pamph. Acts, 297 to 340—declares the general subjects of taxation in sections 4 to 13, inclusive, but makes no mention of railroads. Sections 19 to 23, inclusive, declare the duty of tax-payers to render to the tax-assessor of the county a "complete list" of these general subjects of taxation. Sections 29 to 40, inclusive, define the duty of the tax-assessor in assessing the taxes. He is required to fill up an assessment list for each tax-payer, which is to be signed and sworn to by the tax-payer.—Sec. 23. These assessments are to contain the "amount or value of each item, as valued by the assessor, upon which they are liable to pay taxes."—Ib. All these are to be entered in a book, &c., by the assessor.—Sec. 37. None of these provisions mention railroads. Other and later provisions relate to licenses, with which the assessors have nothing to do. All these provisions relate to State taxes, as we shall hereafter show.

Sections 24 to 28 of the act, relate to railroads and telegraph companies; and the provisions in regard to these are entirely different. As to these, the assessor has nothing to do with the sworn list of the tax-payer, nor in the matter of fixing the values. These duties are confided to the auditor, who is to notify the assessor thereof. The assessor, it is true, is required to assess the local property of the railroad in his county; but of the road proper, and its rolling stock, he has nothing to do with the assessment. He simply assesses, and adds the *other local* property to the assessment, which has been made and furnished to him by the auditor. Nor has the board of equalization, sections 97 to 101, inclusive, any power or jurisdiction over these assessments made and furnished by the auditor. We have thus shown that under the act of 1868, two distinct systems of assessment are provided: One, of general subjects of taxation, which is required to be made by the assessor; the other, of railroads and their rolling stock, which duty is cast on the auditor. There has been no law, either on or since December 31st,

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1868, which authorized the tax-assessor or tax-collector to assess the taxes on railroads proper, or their rolling stock. There is, under the act of 1868, no such thing as an assessment of property for county taxes. The assessment is for State taxation alone. After the assessor completes the assessment, and makes his returns to the probate judge, under section 96 of the act, it is the duty of the board of equalization, to make an equalization of the assessment for that year.—Sec. 98. The clause of the statute in reference to the levy of the county tax, is in the following language :

“Sec. 103. That it shall be the duty of the court of county commissioners, immediately after the adjournment of the board of equalization, to proceed to levy the amount of taxes required for their county for that year, not to exceed the rate levied by the State.”

Levy and assessment have very different meanings. The levy of taxes is a legislative function, and declares the subjects and rate of taxation.—Burroughs on Taxation, 194; Cooley on Taxation, 244-5. Assessment is *quasi* judicial, and consists in making out a list of the tax-payer's taxable property, and fixing its valuation or appraisement.—Hilliard on Taxation, 290. Taxable property is here used in its broad sense, and embraces all subjects of taxation, on which a tax has been levied by the law-making power. The distinction is the difference between prescribing a *rule* of action and *administering* that rule to persons and subjects that fall within its provisions. The legislature levies State taxes, and the tax-assessor assesses them, except the tax on railroads and their rolling stock, which is assessed by the auditor. The court of county commissioners levies the county tax, providing for no assessment, but adopting the State assessment, as the basis and measure of the tax-payer's liability. It also adopts the aggregate of the State assessment as the basis and postulate by which it adjusts the county levy, so as thereby to raise the required sum to meet the county wants. These are the data which enable the court to determine the proper per centage to be levied on the State assessment, to provide for county expenses. Hence the levy, *per centum*, will be greater or less, in the proportion which the county demands bear to the aggregate of the State assessment. State taxes are assessed; county taxes are only levied. A law which levies a tax, and provides for its assessment, will not justify the collection of the tax until the assessment is first made. To attempt otherwise, would be equivalent to an attempt to execute a law against a person or thing before it had been judicially ascertained and determined that such person or thing was amenable to its provisions. There must

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be an assessment, either made pursuant to the levy, or adopted as the basis of the levy, else there can be no lawful collection of taxes. In *Hilliard on Taxation*, 291, it is said, "Assessment is so far an indispensable incident to taxation, that no right of action arises until a legal assessment is made. . . . Even a payment of money as taxes on property before the assessment, and the collector's receipt therefor, are no legal discharge of taxes subsequently assessed thereon." So in *Cooley on Taxation*, 259, it is said, citing many authorities, that, "Of the necessity of an assessment, no question can be made. Taxes by valuation can not be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities."—See *Burroughs on Taxation*, 205.

In the case of the *County of Perry v. Selma, Marion & Memphis Railroad Company*, it is shown by the averments of the petition that no county tax was levied for the years 1870-1-2-3-4. In the acts of 1868 and 1875, "To establish revenue laws for the State of Alabama," are clauses which empower the assessor and collector, in certain conditions, to assess property for taxation, which had escaped assessment during the previous years.—See sections 36 and 50 of the act of 1868, and sections 32 and 46 of the act of 1875. See, also, *Lehman, Durr & Co. v. Robinson*, during the present term. Those sections give no authority to the assessor or collector in either of the cases under discussion; because, first, this is not a case of property which has escaped assessment for any previous year. All the railroads, so far as we are informed by the records, were assessed, each year, for State taxes. The property, then, had not escaped the assessor, and had not escaped taxation. Second, the assessor had no right to assess railroads or their rolling stock for taxation, and hence it can not, under fair construction, be affirmed that they had escaped the tax assessor. The auditor was the tax-assessor for these, and they had not escaped him. If they escaped any official authority, it was the court of county commissioners, and they escaped levy, not assessment. Third, as there is no authority to assess any property for county taxes, and the railroads were assessed for State taxes, it is not true that they escaped any assessment which the law authorizes to be made.—See *State of Mo. ex rel. v. Severance*, 55 Mo. 378-383.

There is no power conferred by any of the statutes to assess escaped taxes, except that given to the assessor and collector in the sections above referred to. There is no power given to levy county taxes, save that conferred on the court

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of county commissioners in the section above copied. If omitted county taxes, for previous years, can be levied, it must be done by that court; for on it is conferred all the power the legislature has granted to levy county taxes. There is no power conferred on that court, by express provision, to levy for escaped taxes. Can the power be implied? In Burroughs on Taxation, 197, it is said: "Property is often omitted from the roll by the assessors for one or a number of years, and most of the States have statutes authorizing the assessors, when they ascertain such omissions, to place the property on the roll, with the tax extended not only for the current year, but for the past years. The legislative authority given to tax the property for the omitted years, is not exhausted by the failure of the party or the assessor to place it on the roll, and such assessments are valid. But, in making such re-assessments, the statute must be strictly followed. . . . Their duty is ministerial; they are to do a specific thing, and they have no discretion."

We hold that the court of county commissioners has no authority to levy taxes on railroad property which has escaped them during previous years. Such authority can only exist by statute, and the statute has not conferred it.

Another argument: Levy of taxes for county wants, is an express, fixed per cent. on the State assessment. The gross amount of such assessment, and the wants for county support, furnish the rule by which the needed per centage is arrived at. If the State assessment, which furnishes the standard for adjusting the county levy, be materially augmented, then the rate *per cent.* necessary to raise the requisite county revenue, will be proportionately diminished. If a first levy, on a part of the State assessment, yielded sufficient county revenue, then a like per cent. levied on a materially increased assessment, would necessarily yield a surplus. This, however, would furnish no ground for vacating the levy, if it were otherwise made according to law.

In the case of *Perry County v. Selma, Marion & Memphis Railroad Company*, the petition avers that the county tax for 1869, was levied by the court of county commissioners. Under the act approved February 9th, 1870, which we have above declared to be unconstitutional, the auditor instructed the tax-collector not to collect of the railroad company the county taxes for the year 1869; and the tax-collector obeyed him, and did not collect the taxes. Section 120 of the act of 1868, is relied on as justifying this action of the tax-collector; and further, as settling by a judicial determination that the railroad can not be held accountable for the county taxes of that year. The authorities relied on in support of this position

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are *Hobson v. Conn*, 1 Duval, (Ky.) 172; *Ex parte Randolph*, 2 Brock. 447, 473-4-5. See, also, Burroughs on Taxation, 238, 241. The section of the statute invoked, is as follows :

"Sec. 120. That the auditor of State shall, from time to time, prescribe such forms and give such instructions as he may deem necessary to carry into effect the provisions of this act, and decide all questions which may arise as to the true construction of this act, or in relation to the duty of any officer under this act; and the instructions thus given shall be obeyed by, and the decisions thus made shall be binding upon all county and municipal officers."

We consider it unnecessary to decide how far decisions made by the auditor would be binding, and conclusive as judicial decrees, on questions therein embraced. All the provisions of the section copied, relate, in terms, to the revenue law approved December 31, 1868. The instructions of the auditor to the tax-collectors, not to collect county taxes levied on railroads and their rolling stock for 1869, were given, not under the revenue law of 1868, but under the attempted statute amendatory thereof, approved Feb. 9, 1870, which we have declared above never became a law. This was not a decision or instruction by the auditor, as to any matter arising under the revenue law of 1868, and hence, is not binding on the county officers. We think the railroad is liable to pay the county tax levied for the year 1869.

The only other question we consider it necessary to determine, arises on the averment of the bill of the Western Railroad Company against Chambers county, that the county tax of 1875 was levied in August of that year, when it should have been done in July, under section 93 of the revenue law of 1875. We hold this provision of the law to be directory, and that such levy made at the regular August term of the court, as this was done, is valid.—See Hilliard on Taxation, 299, *et seq.*; Burroughs on Taxation, 249; Cooley, do. 212, *et seq.*

The bill of the Savannah & Memphis Railroad Company against Chambers county, contains nothing material that is not disposed of above, unless it be some averments of irregularity in the attempt to force the collection of the taxes, which furnish no ground for a bill in equity.

We have not considered the question whether a bill would lie, even if the taxes levied by Chambers county were illegal.—See *Stone et al. v. Mayor, &c., of Mobile*, and *Mayor, &c., v. Baldwin*, 57 Ala. 61. Nor have we considered the question, whether relieving railroad companies from the payment of county taxes violates article 9 and section 4 of

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article 13 of the Constitution of 1868, or sections 1 and 6 of article 11, Constitution of 1875. These records do not render such inquiry necessary.

In the case of *Perry County v. Selma, Marion & Memphis Railroad Company*, the decree of the Chancellor is reversed, and the cause remanded, that the Chancellor may proceed to order the payment of the county taxes, levied for the year 1869.

In the case of the *Western Railroad Company v. Chambers County*, and *Savannah & Memphis Railroad Company v. Same*, the decrees of the Chancellor are affirmed.

MANNING, J., dissenting—upon the subject of a valid enactment of the act of Feb. 9th, 1870—is of opinion that, whether the bill was properly introduced into the Senate first, was a question to be determined by the legislature, and not by the courts.

ON PETITION FOR REHEARING IN THE CASE OF PERRY COUNTY V.
SAVANNAH, M. & M. R. R. CO.

STONE, J.—A petition for rehearing has been filed in this cause, on two grounds: First, it is contended that taxes can not be collected after the expiration of the tax year in which they are assessed, because, as it is alleged, the law has made no provision for such collection. In *Hibbard v. Clark*, 56 N. H. 155, a majority of the court held, that taxes levied and assessed are not a debt due from the tax-payer, which can be made a set-off under their statute. CUSHING, C. J., dissented. In *Finnegan v. City of Fernandina*, 15 Florida, 379,—a proceeding in equity—it was decided, "A court of equity will not devise a method to recover a debt, because of failure to recover it through the ordinary legal remedies." This had reference to unpaid taxes, resting on peculiar grounds, and materially influenced by the limited powers of the chancery court. It sheds no light whatever on the question we are discussing. The case of *Cobb v. Corporation of Elizabeth City*, 75 N. C. 1, was also a question of set-off, sought to be enforced in equity. The court said: "Debts owing by the town corporation, in whatever form they may be evidenced, can not be set-off against a demand for town taxes, unless there be a special contract to that effect." In *Cooley on Taxation*, 300, it is said, "that taxes are not debts in the ordinary acceptation of that term, and that the statutory measures are to be resorted to for their collection. Generally, no others are admissible. But the remedy by suit may be given by statute either directly or by implication.

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If no specific remedy is expressly given, or only an imperfect or inadequate one, a presumption that a remedy by suit was intended is but reasonable." In the excellent work of Burroughs on Taxation, we find the following language: "No other objection has been urged to the recovery of taxes by action. A remedy is provided by statute for the enforcement of the tax by distress, and sale of goods of the taxpayer, and the rule of the common law is, that when a statute creates a right and provides a particular remedy, it is exclusive of all common law remedies. But this doctrine only applies to those to whom the statute is a rule of action. The king is not bound by a statute unless expressly named, and it is well settled that so much of the prerogatives of the king as constitute him *parens patriæ*, or universal trustee, vest, under our system of government, in the State, or body politic. The reason of this rule ceasing, in the case of the State or United States, the rule itself ceases, and either debt or assumpsit may be sustained for taxes. . . it would seem to be clear upon principle that an action may be maintained for taxes. . . Taxes are a political necessity. If the law raises a promise to pay, that one of its citizens may not obtain the services or goods of another without compensation, surely it will raise it that the State may exist. The tax is a personal charge against the citizen, notwithstanding a lien upon the property may be given by statute for its payment." See pages 253-4; *Ib.* 4. These principles are well justified by adjudged cases.—See *Savings Bank v. U. S.* 19 Wall, 227; *Meridith v. U. S.* 13 Pet. 486; *U. S. v. Lyman*, 1 Mas. Cir. Ct. 482; *City of Dubuque v. Ill. Cen. R. R. Co.* 39 Iowa, 56. In the case last cited, the doctrine was carried to a length not necessary to be followed in this case.

We think it may be affirmed as the result of the foregoing, and a large preponderance of authorities, that taxes levied and assessed become a legal liability on the tax-payer, that may be enforced by an action at common law, unless the statute gives a remedy that is, in its nature, exclusive. But it is probably enough in this case to maintain the proposition, that levy and assessment of taxes create a legal liability on the tax-payer to pay.

We have received another argument on the subject of collecting taxes that have been assessed, and not collected during the year of their assessment; and we confess ourselves much embarrassed by the present condition of our statutes. We think we may safely affirm that it has been the custom of tax collectors to collect taxes for previous years, which, for any reason, have escaped collection. We shall hereafter show there is warrant for this in the statutes. We think the

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confusion and difficulty in which the subject we are discussing is involved, have grown out of amendments and alterations of the revenue law, which have been made from time to time, without observing and preserving the harmony of the system, by other amendments, rendered necessary by those made. This is not to be wondered at, considering our comprehensive and complex revenue system. In tracing the history of our revenue legislation, as affecting this question, we need not go behind the revenue law approved December 31, 1868, Pamph. Acts, 297. Sections 47-8-9 of that statute direct when and how the tax collector shall meet the tax-payers for the purpose of receiving their taxes, and what opportunities he shall afford them to meet him and make voluntary payment. Section 53 provides that the tax collector, upon the mere assessment lists, and without other process, may "levy upon any personal property of delinquent tax-payers," and sell the same for the purpose of collecting the taxes. A further clause of the same section provides and directs that "it shall also be the duty of each tax collector to ascertain, in his respective county, who are the insolvent or defaulting tax-payers;" and it is then made the duty of the tax collector, "to ascertain who, if any person or persons, are indebted to, or has in his or their possession, or under their control, any money or effects, the property of the said defaulting tax-payer, or insolvent tax-payer; and this section, 53, then makes provision for garnishment in such cases. What is the meaning of the clause, shall "ascertain, in his county, who are the insolvent or defaulting tax-payers?" Is it that he shall ascertain the defaulters of the current year, or does it reach to and embrace defaults in former years? If the former, the employment of the word *ascertain* is strangely inapt. He has in his custody and keeping all the tax-lists of that year. He knows whose taxes have been paid, for they have been paid to him. Knowing those who have paid, he knows, equally as well, who are the defaulters. Ascertain, as here employed, means to find out. He has nothing to find out as to delinquents of the current year; for he knows all. And, in the very next clause of the same sentence, it is made his duty to *ascertain* who, if any person or persons, are indebted, &c. Ascertain, in this branch of the section, certainly means to *find out*. There can be no dispute of this. As a rule, a word twice employed in the same sentence, or statute, is to be interpreted in the same sense, unless the context shows it was intended to express a different meaning. There is nothing in the context to show that, in this sentence, the word ascertain was employed with variant meaning.—See *Lehman, Durr & Co. v. Patrick Robin-*

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son, present term. No officer is ever charged with the duty of ascertaining that which he already knows.

But sections 62 and 63 of the revenue law of 1868, demonstrate that the tax collector is charged with the duty of collecting delinquent taxes of preceding years. After advertisement, it is made his duty "to offer at public sale . . . all lands, town lots, or other real property, on which taxes of any description for the *preceding year or years* shall have been delinquent, and remain due and unpaid." And these provisions have been preserved in every revenue law since that time.—See revenue law approved March 19, 1875, sections 48, 57, 58, Pamph. Acts, 3; revenue law approved March 6, 1876, ch. 6, § 9, and ch. 8, §§ 1, 2, Pamph. Acts, 42; Code of 1876, §§ 416, 438, 439. These provisions show what is meant by the word ascertain, and that the power of the collector is not limited to the year in which the assessment is made. Yet, there are no words in the statutes which direct in what manner the tax collector is to be informed of delinquencies in precedent years, unless it be found in the word ascertain, in section 416 of the Code of 1876. But it may be objected that section 438 of the Code of 1876, speaks of and relates to taxes for preceding years assessed on lands only. This is true, and, we must admit, presents a difficulty in the construction we are about to give. But there is a difficulty in any conceivable construction. We have seen above that the tax collector may, and must collect, even by sale if necessary, taxes for previous years assessed on lands. Hence, we can not hold that his power to collect is limited to assessments made for the tax year in which he is collecting. Can there be a reason for giving him power to collect past due taxes on lands, which does not apply with equal force to previous assessments of other subjects of taxation? We think not. The whole theory of our tax laws forbids the idea that delinquent tax-payers, by eluding the tax collector for a season, thereby exonerate themselves or their property from the payment of such taxes. It is the duty of the tax collector to ascertain who are the insolvent or defaulting tax-payers. No discrimination between defaults in paying taxes on lands, and on personalty. He must ascertain the insolvents and defaulters. For what purpose? That he may compel collection by garnishment.—Section 416. Then, that he may sell for taxes due for past years.—Section 438. We think the word *ascertain*, is without import, unless we construe it as enlarging inquiry beyond the tabulated books of assessment in the collector's hands. It is eminently proper and serviceable, if extended to defaults of previous years. Thus construed, this duty of the collector harmonizes completely

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with that other duty cast on him, of assessing the taxes of those who have escaped the tax assessor. The policy of the law is, that every one liable to assessment, shall contribute his proportion to the support of the government which protects him. The following sections of the Code of 1876 confirm, very materially, the views expressed above: sections 448, 466, 471. And, to show that these provisions have a general operation, with limited, specified exceptions, see section 478.

But let us inquire what absurd results would ensue from the opposite construction. A tax-payer, who has failed or neglected to have his taxes assessed, is liable to have them both assessed and collected, as escaped taxes, for any number of years afterwards.—Code of 1876, §§ 392, 413. While, on the other hand, the argument is, that if the tax-payer's property has been assessed, and his only default consists in not paying the assessment during the tax-year for which it was made, he is, by his own default or dereliction, entirely absolved from all payment. We do not think our statutes admit of such construction as this.

An argument has been made before us, based on section 421 of the Code of 1876, which is in the following language: "The tax collector, must report to the Court of County Commissioners at the April term in each year, on oath, a list of persons from whom he shall be unable to make the taxes, which shall be termed 'list of insolvents,' and also a list of such persons as have been overcharged by the assessor, which shall be termed 'list of errors in assessment,' and such court, after a rigid and searching examination of such lists and a proper correction of the same, shall credit the collector with the taxes due to the county thereon, and the probate judge shall certify such lists to the auditor, who shall allow the collector credit therefor, on his final settlement for the State taxes due thereon, and after such lists shall have been passed upon, and the credits given as herein required, the tax collector shall be, and is hereby prohibited thereafter from collecting any tax due upon any such insolvent lists." The section then provides that the judge of probate shall distribute such insolvent claims among the notaries or justices of the several beats for collection. The argument is, that after this return by the tax collector has been acted on by the Court of County Commissioners, the tax collector is prohibited from making collection of taxes previously assessed. The extract above is part of section 1 of the act "to amend section 15, chapter 6, of an act 'to establish a revenue code for the State of Alabama,' approved March 6, 1876."—Pamph. Acts, 16. This branch of our revenue system had its origin

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in the revenue law approved March 19, 1875.—Pamph. Acts, 3. Section 50 of that act, directed that after the insolvent list was passed on by the Court of County Commissioners, the tax lists, so allowed as insolvent, should be, after certain notice posted up, sold in the several beats to which the said insolvent tax-payers belonged. Combination and fraud in its execution, caused a speedy change of this provision. Section 15, chapter 6, of the revenue law approved March 6, 1876, only differs from section 1 of the act approved February 9, 1877, in fixing a different and later time when notaries and justices of the peace in the several beats shall make settlement of insolvent tax lists turned over to them. The extract given above is common to, and identical in each of the statutes of 1876 and 1877. It will be observed that this only relates to the insolvent lists, reported by the tax collector, and passed on and allowed by the Court of County Commissioners. It is only this class, turned over to the notaries and justices of the peace, that the tax collector is prohibited from collecting thereafter. Any taxes of that or preceding years, not reported and allowed as insolvents, he is not prohibited from collecting, by this section.

We said above that our revenue system is involved in some confusion. The following sections of the Code of 1876, show to what we refer. Taxes become delinquent January 1st, next after assessment, if not sooner paid.—Section 361. After the 1st day of January, in each year, the tax collector must proceed, without delay, to levy upon any personal property of delinquent tax-payers.—Section 415. After the tax-collector has ascertained who are the insolvent and delinquent tax-payers—(this can not be of the current year taxes, until after January 1st, for it is only then they become delinquents), if he ascertains—finds out—that any person is indebted to or has effects belonging to the delinquent tax-payer, he must serve notice of garnishment on such person.—Section 416. On the first Monday of March, and on any day thereafter in each year, the tax collector may offer at public sale . . . all lands, town lots, or other real property, on which taxes of any description for the preceding year or years shall remain due and unpaid.—Section 438. Garnishments are suits; and if the sum of delinquent taxes be over one hundred dollars, the process must be returnable to the Circuit or City Court. It is known that such suits may be pending for months before they are brought to a final trial. Yet all these varied proceedings must be crowded into a fraction over three months; for, under section 421, “the tax collector must report to the Court of County Commissioners at the April term in each year, on oath, a list of persons from whom he

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shall be unable to make the taxes, which shall be termed 'list of insolvents.'" Failing to report to the April term, the law makes no provision for another or later report; and hence, all tax lists not reported insolvent to the April term, he remains charged with, and must account for as taxes collected. It would seem to be very improbable that a tax collector, no matter how vigilant, could make the process of garnishment available within that short time. And if he act on the prudent side, and report such claim insolvent, he thereby forfeits the right to collect such tax, under section 421; and the State and county lose the right to prosecute garnishment under section 416; for the statute makes no provision for any person, other than the tax collector, to issue or prosecute that suit.

In conclusion of this subject, which we have probably dwelt on at too great length, we hold that it is the duty of the tax collector to ascertain and collect taxes assessed for precedent years, which have become delinquent; and that this duty and right are limited by the acts of 1876 and 1877—now section 421 of the Code—only to the extent that he reports tax dues as insolvent, and they are so allowed by the Court of County Commissioners. These, as we have shown, he is prohibited from collecting.

The second ground urged for a rehearing in this cause is, that so far as the petition seeks to collect taxes for 1869, it is barred by the statute of limitations. It is a sufficient answer to this argument, in the present case, that the statute is neither pleaded, nor specified as a ground of demurrer.—1 Brick. Dig. 699, § 859. But, inasmuch as this question may be raised when the case returns to the Chancery Court, it is probably better to consider and decide it now.

We concede that a county, suing or being sued, is not exempt from the operation of statutes of limitation, which cover the action sought to be enforced. They are not privileged from suit, under the principle, that 'time does not run against the sovereignty.' They are not the State.—See *Miller v. The State* use, 38 Ala. 600; *Kennehunkport v. Smith*, 9 Shep. (22 Me.) 445; *Armstrong v. Dalton*, 4 De. 568; *Lessees &c. v. First Pres. Ch.* 8 Ohio, 229. But we have no statute of limitations which covers this case.—See Art. 1, Ch. 20, Tit. 1, Part 3, Code of 1876, §§ 3223 to 3231. And section 392 of the Code goes very far to show that there was intended to be no bar against the liability to pay taxes, short of the twenty years presumption of payment.

It is also contended that the Court of County Commissioners of Perry, by settling with its tax collector, must be regarded as having remitted the taxes of 1869. It might be

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sufficient answer to this objection to say, that the record nowhere shows that such settlement was made. We suppose the facts are, that the court, acquiescing for the time in the act of February 9, 1870, referred to above, and, in the construction given to it, did not require their tax collector to collect or account for the railroad tax due the county for 1869. We do not regard this as a surrender of the claim, or as any bar to its present operation.

On the single question of the tax levied for 1869, the decree of the Chancery Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

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Action to Recover Damages for Injury to Premises in Opening Ditches in the Streets of a Town.

1. *Demurrer must be specific.*—A demurrer assigning as a ground "that said complaint does not contain a substantial cause of action," fails to specify any particular in which the complaint so failed, and therefore, under the statute, can not be sustained.

2. *Municipal corporation; acts of; when liable for damage in ditching, &c.*—A municipal corporation does not act judicially, but its acts are administrative in the construction of ditches, &c., to drain the streets; and if in so doing it concentrates water and discharges it on adjoining lands, whereby the land is washed up and injured, it is responsible in damages for such injury.

3. *Demurrer without consequence.*—A demurrer which discloses no defect in the complaint, is without consequence.

4. *Irrelevant question.*—A question in this case, whether "the water could have any other outlet through plaintiff's lot from the street, unless the Council was to make one," is irrelevant and is properly excluded.

5. *What good defense; rights conveyed by former owner.*—Evidence that "one of the sewers complained of, was put where it is at the request of a former owner," is admissible and is a good defense, because such former owner could not invest his alienee with greater rights than he himself had.

6. *Same; what will not preclude grantee from recovering damages.*—Such an injury being a nuisance, the mere fact that the former owner brought no action or made no complaint against it, will not preclude a purchaser from him of the right to recover for the damage he may suffer—if by the act of the grantor the lot had not been subjected to a servitude for an outlet to the water of which the streets should be relieved.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. J. McCaleb Wiley.

This was an action by Robert W. Coleman, appellee, against the appellants.

The appellants opened up and constructed two ditches, or

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106	312
58	570
115	193

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128	301
58	570
132	551

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gutters, along the street running in front of plaintiff's premises, situated in the city of Troy; and built two sewers or culverts to be used for conducting water across and from said street, near to plaintiff's lot, which plaintiff alleges "was done in so careless and negligent a manner as to cause divers large quantities of water to flow at divers times down to, against, upon and into plaintiffs's lot, thereby tearing up and washing away the soil and earth on said premises, to the great injury and damage of the plaintiff."

The case may be fully understood from the opinion.

JOHN D. GARDNER, for appellants.—1. The complaint is entirely uncertain as to whether the plaintiff seeks damages on account of the ditches and gutters, or whether it was for the manner in which they were constructed. In the location of sewers and ditches, &c., the city acts judicially and is not liable.—*City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116. The complaint will be construed most strongly against the pleader. Said authority is applicable to the other grounds of demurrer.—See, also, *Wilson v. Mayor of New York*, 1 Den. 595; *Kavanaugh v. City of Brooklyn*, 38 Barb. 232; *Roberts v. Chicago*, 26 Ill. 249.

2. The plaintiff did not have so much as a reversionary interest in the property at the time of the act complained of, and if he did, he must sue as reversioner.—*Chitty's Pleadings*, 63. As to the continuance of the nuisance, see *Ib.* 66.

PARKS, and B. F. HUBBARD, *contra*.—1. The demurrers are nothing more than general, and therefore properly overruled.—42 Ala. 672; 34 *Ib.* 485; 35 *Ib.* 259; *Ib.* 722.

2. The corporation was liable for the damage.—*Gilmer & Taylor v. City Council of Montgomery*, 33 Ala. 116, 1st paragraph of opinion.

MANNING, J.—The complaint, in four counts, alleges in different forms, that the appellant, defendant below, had caused certain ditches and sewers to be constructed for the drainage of the town, by which it had collected and concentrated the water in a much larger volume and stronger current than previously, upon the premises of appellee, the plaintiff, and caused the tearing up and washing away of the soil and earth of his lot, to his great damage.

1. A demurrer was filed; after which an amendment was made, adding, after the name of defendant—The Mayor and Councilmen of Troy—the words, "a municipal corporation in the State of Alabama under the laws of the State of Alabama." The first cause of demurrer assigned, did not specify

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any particular in which the complaint failed to set forth a substantial cause of action, and, therefore, under the statute on the subject, can not be regarded.

2. The second ground of demurrer is, that the complaint shows that the acts complained of were of a judicial nature, for which defendant can not be made liable. This is a misapprehension. The acts complained of may, as they affected the inhabitants of the corporation, be regarded as administrative, but they are no more judicial, when done by such a body politic, than if they were done by an individual. And, with Judge Dillon in his work on Municipal Corporations (§ 799), "we are unable to assent to the doctrine that, by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and discharge it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." See, to a like effect, the opinion of Walker, J., in *City Council of Montgomery v. Gilmer*, 33 Ala. 130, and cases there referred to.

3. The third ground of demurrer that the "complaint shows on its face, that defendant is a municipal corporation," discloses no defect in the complaint, and is without consequence. And the other two grounds assigned, are without foundation in the complaint.

4. The interrogatory, whether "the water could have any other outlet through plaintiff's lot from the street, unless the Council was to make one," was irrelevant, and there was no error in sustaining the objection made to it.

5. Appellant proposed to prove, "that one of the sewers complained of by plaintiff," (they seem to have been culverts, rather than sewers, and to have extended only across the street,) "was put there at the request of Joel D. Murphree, who owned said lot at that time," that is, the lot now belonging to plaintiff, to which the damage was done. But the circuit judge ruled that this could not be done. It seems to us, that in this there was error. If the former owner, who had power to charge the lot with any servitude in favor of the public, expressly authorized the building of one of the structures complained of, in such a situation and manner as that it would naturally turn upon the lot a large portion of the water which they desired to divert from the street, he thereby deprived himself of any right of action against the corporation for that which he, with a knowledge of the consequences to his property, induced the authorities to do. And he could not, by a transfer of the lot to another, invest

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his alienee with larger rights than he himself had. The purchaser would take the property *cum onere*. As for this error, the judgment will have to be reversed.

6. It is unnecessary to examine the very numerous charges that were asked of, and given or refused by the court. We will add only, that, as the matter complained of is in the nature of a nuisance, the mere fact that the former owner brought no action for it, or made no complaint against it, will not preclude a purchaser from him of a right to recover for the damage he may suffer therefrom, if by the act of his grantor, the lot had not been subjected to the servitude of an outlet for the water of which the streets ought to be relieved. A ruling of this nature, was made by the Supreme Court of Minnesota, in a case very similar to the present.—*O'Brien v. The City of St. Paul*, 18 Minn. 176.

Let the judgment be reversed and the cause remanded.

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Bill in Equity to annul a Deed and subject the estate therein to Administration and Distribution under a Will.

1. *Power of sale under a will; what valid compliance.*—A testator provided in his will that his wife was to have the power of selling or exchanging any of the property devised, for cash or other property, provided the power be exercised by and with the advice of two persons named in the will; whereupon the wife, by ordinary deed of bargain and sale, duly attested, conveyed a lot to another, reciting in the conveyance that it was with the knowledge and consent of the two persons named in the will, and such persons endorsed on the conveyance that they ratified and confirmed the sale,—*held*, that the sale was a valid execution of the power in the will, and conveyed the title to the purchaser.

2. *Bona fide purchaser from trustee; not responsible for application of funds.* One who buys in good faith from a trustee having power to sell, and pays the purchase money, is not responsible for its application, unless the purchaser colluded with the trustee, or knew of his intention to waste or mismanage the funds.

APPEAL from the Chancery Court of Barbour.
Heard before the Hon. N. S. GRAHAM.

W. H. DENSON and OATES & MCKLERoy, for appellant.

J. L. PUGH and D. M. SEALS, *contra*.

STONE, J.—The leading, if not the sole purpose of the present suit, is to have the sale and conveyance of the house

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and lots to Ramser, set aside and vacated, and the title decreed to be "in the heirs and legatees and distributees of said William L. Cowan, and the administrator of said estate placed in the peaceable possession of the same, that the same may be applied to the payment of said advancements, and equitably distributed under the provisions of said will of said William R. Cowan." The bill does not pray a settlement of Fleming's administration of Cowan's estate, and does not pray that the further execution of the will, or Fleming's settlement, be transferred to the Chancery Court. It makes no complaint of the administration of Fleming, and does not seek to hold him accountable for an unequal distribution of the assets. If the bill contained the necessary averments and prayer to raise these questions, it is questionable if some of them at least would not be incongruous with the main purpose of the bill. We will, then, treat the bill as having for its sole purpose the vacation of the sale to Ramser.

1. The power in Cowan's will is in the following language: "My wife is to have the power of selling or exchanging any of the property devised to her, for cash or other property, provided the power is exercised by and with the advice and consent of James L. Pugh and Dr. Sam. C. Cowan." The will contained the following clause, anterior in position to the one copied above: "All my estate left, after the payment of my debts, I give and devise unto my beloved wife, Ann S. Cowan, to be kept together, used and managed by her as she may think proper. My unmarried children to remain with her free of charge for support and maintenance until they marry; and as each child marries, it shall receive in money or property two thousand dollars, to be advanced whenever my wife thinks she can do so, without injury or embarrassment."

It will be observed that this will confers on testator's wife very large discretionary powers, limited in the matter of selling or exchanging any of the property devised, by the sole condition, that it be done with the advice and consent of the two persons named. The deed is an ordinary deed of bargain and sale from Mrs. Cowan to Ramser, conveying the lots in controversy. The concluding clause is in the following language: "In witness whereof I have hereunto set my hand and affixed my seal to this conveyance, with the knowledge and consent of Dr. Sam. Cowan and my brother, James L. Pugh, as by my husband's will directed." This deed was signed, sealed and delivered January 1, 1866, in the presence of two subscribing witnesses, and on it was indorsed the following: "January 19, 1866. We hereby

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ratify and confirm the above sale and conveyance to Jacob Ramser by Mrs. Ann S. Cowan. (Signed) S. C. Cowan, J. L. Pugh." It is proved, not only that the sale and conveyance were made with the knowledge and consent of Cowan and Pugh, but under their advice previously given. It is also proved that Ramser paid the entire purchase money in cash, and that the price paid was the market value of the property. Under these facts, we agree with the chancellor that the will of Mr. Cowan contains a power of sale to Mrs. Cowan, and that she fully conformed to the power and its conditions in making the deed. Buford negotiated the terms of sale, as he was requested to do. For such service, no written authority was necessary. The deed was the consummation—indeed, the making of the contract. Till it was executed and delivered, no contract was made which the law could recognize or enforce.—Code of 1876, § 2121, subd. 5. The sale and conveyance were made by Mrs. Cowan.—See 2 Sto. Eq. Ju. 1062a, and note 2.

2. It is contended that the money derived from this sale was misapplied, and therefore the sale should be annulled. It is not necessary for us to inquire whether there was such misapplication. All knowledge of this is denied by Ramser, and there is no testimony offered to sustain the charge. One who buys in good faith from a trustee having power to sell, and pays the purchase money, is not responsible for its application, unless it be made to appear that the person making such payment colluded with the trustee, or knew of his intention to waste or mismanage the funds.—Code of 1876, § 2197. We do not say there is any evidence of misapplication in this case.

The decree of the chancellor is affirmed.

[Gamble, Ex'r, v. Fowler et al.]

Gamble, Ex'r, v. Fowler et al.*Bill in Equity to foreclose Mortgage.*

1. *Judgment not a lien; execution lien, how lost and removed.*—Judgments do not operate as liens under our statutes; it requires execution in the hands of the sheriff to create a lien on either real or personal property, which lien will be lost if an entire term of the court—from one session to another—is permitted to elapse. A new execution in the hand of the sheriff—not a reviver of the last lien—is required to create a new lien of such character.

2. *Same; when mortgage paramount lien.*—A mortgage executed after an execution lien had been created and allowed to lapse, and before such execution lien was renewed, is a paramount lien to such a renewed execution lien.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. N. S. GRAHAM.

In March, 1871, Corbitt, as administrator of Lawrence, obtained in the Circuit Court of Henry county, Ala., a judgment for \$587.21 against John L. Fowler. Execution issued on said judgment April 3, 1871, which was returned as follows: "Returned by order of plaintiff's attorney, August 1, 1871." "Trawick, sheriff." An alias execution issued Nov. 10, 1871, which was returned by the sheriff with the following indorsement thereon: "Sheriff will not levy this *fi-fa* until further orders. Jan. 8, 1872." "J. A. Corbitt." No other execution was issued until Oct. 30th, 1872, which the sheriff returned indorsed as follows: "Held up by order of plaintiff's attorney, Nov. 29, 1872." The next execution was issued Nov. 19, 1875, which was returned indorsed by the sheriff: "No property found." The next execution was issued May 2d, 1876, and returned also indorsed: "No property." The next execution was issued Oct. 14, 1876, which was levied on certain lands in Henry county, Ala., described in the bill.

The bill in this case was filed Nov. 27th, 1876, and service accepted by defendant Corbitt same day. The land levied on above was sold Dec. 4, 1876, and bought by J. A. Corbitt, one of the defendants. On the 19th day of January, 1872, the complainant's testator took from said Fowler a mortgage on the lands levied on, under the execution last mentioned, to secure a debt of \$1,471, due January 1, 1873. Said debt and mortgage were *bona fide* and for a valuable consideration then and there given, and complainant's testator had no actual knowledge of Corbitt's judgments. The good faith

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of the mortgage and mortgage debt were shown. The question raised by the record is, "was the lien of the plaintiff in execution preserved as against the mortgagee?" The assignments of error go to the decree of the court in dismissing complainant's bill, and holding that the execution lien was superior to the mortgage.

OATES & DENT, for appellant.—1. The execution which issued Nov. 10, 1871, and on which plaintiff in execution, on the 8th day of January, 1872, indorsed as follows, "sheriff will not levy this *fi. fa.* until furthers orders," was, by said indorsement, taken out of the hands of the sheriff, and that when, on the 19th day of January, 1872, eleven days afterwards, the complainant's testator, in good faith and for a valuable consideration, took his mortgage on the lands afterwards levied on, he was protected under the act "For the protection of *bona fide* purchasers for a valuable consideration."—Acts 1868, p. 266. Especially in view of the fact that no other execution was issued until Oct. 30, 1872, this court will take judicial notice of the fact, that between Jan. 8th, 1872, and Oct. 30th, 1872, two terms of the Circuit Court of Henry county had been held. We insist that under the foregoing facts the lien of the plaintiff in execution was lost.—Pamph. Acts of 1868, p. 266; Revised Code, § 2873.

2. Again, we rely on the principle that under our decisions, the acts of plaintiff in execution in holding up and suspending the execution was a constructive fraud which forfeited the lien of said plaintiff in execution as against the mortgagee under the facts in this case. We refer to the following authorities: *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 71; *Patton v. Hayter, Johnson & Co.* 15 Ala. 18; *Branch Bank, &c. v. Broughton, &c.* 15 Ala. 127; *Wood v. Gary*, 5 Ala. 43; *Mobley & Wife v. Leophart*, 51 Ala. 587. See, also, Bump on Fraudulent Conveyances, chap. 20, p. 496-7-8, on executions, judgments, &c.

See, further, on the power of plaintiff to control the execution, *Oswitchee Co. v. Hope & Co.* 5 Ala. 629.

HENRY R. SHORTER, *contra*.—(No brief came to Reporter.)

STONE, J.—In *Dane v. McArthur*, 57 Ala. 448, we decided that judgments do not operate as liens under our statutes. It requires execution in the hands of the sheriff to create a lien, either on real or personal property. And if, after the lien is created by delivering execution to the sheriff, an entire term, from one session of the court to another, is permitted to elapse, during which time no exe-

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cution is placed in the hands of the sheriff, the lien is thereby lost, and it requires a new execution in the hands of the sheriff, to create what, in such case, will be a new lien; not a revivor of the last lien.

Under these well established principles, the mortgage to Gamble, executed in January, 1872, operated a paramount lien on the lands embraced in it, over the claim and lien of Corbitt, administrator; and the complainant, Gamble, was entitled to relief, under his pleadings and proof. The eighty acres released, however, he has no claim on.

The decree of the Chancellor, dismissing the original bill, is reversed, and this court, rendering the decree which that court should have rendered, doth order and decree that said mortgage be foreclosed, and the register is directed to take and state an account of the amount due complainant on said mortgage debt, and report the same to said Chancery Court, for its action thereon. All other questions are reserved for decision in the court below.

Reversed and remanded.

58	578
97	396
58	578
106	488
58	578
106	199
109	166

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Action by Probate Judge to Recover Fees.

1. *Fees and costs distinguished, and defined.*—Costs and fees are essentially different. The former are an allowance to a party for the expenses incurred in prosecuting or defending a suit—an incident to the judgment; while the latter are compensation to public officers for services rendered individuals, in the progress of the cause, or (in another aspect), not in the course of litigation.

2. *Compensation for recording conveyance; a fee, recoverable how.*—The compensation of a probate judge for recording a conveyance, is a fee and not costs; and may be recovered from the party for whom service is rendered in an ordinary action for work and labor done and performed.

3. *Same; statutes strictly construed; fees only allowed as prescribed.*—Whether statutes as to fees be as strictly construed as those imposing costs, is not a practical question. But whenever a judge of probate, or any other public officer, demands from an individual a fee for official service, he must point to some clear and definite provision of the statute authorizing the same.

4. *Compensation to probate judge for registering conveyances; what allowed by statute.*—Registering a conveyance in the probate office is an entirety—comprehending the body of the conveyance, the probate, acknowledgment if any, the endorsement of the day received for record, and the certificate of registration—for which service the statute fixes the compensation at twenty cents per hundred words. There is no statute authorizing a charge of a separate and additional fee for the certificate of registration. The above compensation is for the whole act.

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APPEAL from City Court of Selma.

Tried before the Hon. JONATHAN HARALSON.

This suit was originally brought before a justice of the peace by the appellee, probate judge of Dallas county, to recover *fifty cents* of the appellant, for a certificate of a deed, duly recorded by said probate judge, under § 2148 of the Code of 1876. There was no dispute about the facts. The case was taken to the City Court of Selma, where judgment was rendered against appellant for the amount claimed. Said judgment is now assigned as error.

JOHN P. TILLMAN, appellant, *pro se*.P. G. WOOD, appellee, *pro se*.

BRICKELL, C. J.—The rule of statutory construction is well settled, that statutes giving costs are not to be extended beyond their letter, but strictly construed, for the reason that costs are in the nature of a penalty.—*Thompson v. Farr*, 1 Rich. Law, 4; *Lee v. Singley*, 16 Ala. 773; *Dent v. State*, 42 Ala. 514; Sedg. Stat. & Const. Law, 307. Costs and fees were originally altogether different in their nature. The one is an allowance to a party for expenses incurred in prosecuting or defending a suit; the other, a compensation to an officer for services rendered in the progress of a cause. Therefore, while an executor or administrator was not personally liable to his adversary for costs, yet, if at his instance, an officer performed services for him, he had a personal demand for his fees.—*Musser v. Good*, 11 Serg. & Rawls, 247. There is in our statute a manifest difference between costs and fees in another respect. Costs are an allowance to a party for the expenses incurred in prosecuting or defending a suit—an incident to the judgment; while fees are compensation to public officers for services rendered individuals not in the course of litigation.

2. The compensation of a probate judge for recording conveyances and for the larger part of the services he is required to render, is strictly a fee, and not costs. The party to whom they are rendered is alone responsible for the compensation, and of him it may be recovered in an ordinary action for work and labor done and performed.

3. Whether statutes prescribing this compensation should be subjected to the strict construction of statutes imposing costs, is not a practical question. In all our statutes defining the services for which a public officer is entitled to compensation, and fixing its rate, there is either an express declaration, or a manifest indication of an intention that they

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shall be, as at common law, were statutes imposing costs, strictly construed. The 6th part of the Code is devoted to the subject of fees and costs, and the first chapter to general rules applicable to all fees and costs. One of these rules, a substantial re-enactment of a territorial statute (Clay's Dig. 239, § 12), is, that "the law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly authorized by law."—§ 5017. The fees of judges of probate, are specified with very great particularity, and it is declared, "judges of probate may receive the following fees, and no other."—§ 5030. It results that when a judge of probate, or any other public officer, demands from an individual a fee for services rendered, he must point to some clear and definite provision of the statute, which authorized him to make the charge and demand.—*Lee v. Singley, supra*; *Dent v. State, supra*.

4. The statute authorizes the registration of deeds of conveyance of real estate, in the office of the judge of probate of the county in which the estate may be situate. The judge must, at the foot or in the margin of the record, specify the day of the month and year of the delivery to him of the conveyance for record; and "must certify on the same when it was received and recorded; and in what book and page or pages the same is recorded; and must deliver it to the party entitled thereto, or his order, on the payment of fees of registration; but the probate judge may refuse to endorse "filed" on any conveyance, or to record the same, until such fees of registration are paid."—Code of 1876, § 4148. The fee for recording wills, inventories, sale-bills, reports, decrees, deeds of conveyance, and all other instruments, and all proceedings required by law to be recorded, and not herein otherwise provided for," is fixed at twenty cents per hundred words. There is also a fee, "for each certificate without the seal of office," of fifty cents.—Code of 1876, § 5030. The appellant delivered to the appellee, as judge of probate of Dallas county, a deed of real estate for registration, which, having been recorded, he demanded of the appellant, not the fee of twenty cents per hundred words for its registration, but an additional fee of fifty cents for the statutory certificate of its registration. The appellant declining to pay the latter fee, this suit was brought for its recovery, before a justice of the peace, and by appeal came to the City Court, which rendered judgment declaring the appellee was entitled to recover. We cannot concur in the judgment of the City Court. It would be a very liberal construction, resting wholly on intendment and implication, not warranted perhaps of any statute, certainly not of one we are commanded

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to construe strictly, which would extend to the certificate of registration, the general words *for each certificate without the seal of office*. The registration of a conveyance is an entirety, comprehending not only the body of the conveyance, but the probate, or certificate of acknowledgment, the statute authorizes, if any are appended or endorsed, the endorsement of the day it was received for record, and the certificate of registration. Without all these, the registration is not complete, and for all the statute intends the compensation of the judge shall be at the rate of twenty cents per hundred words. It is compensation for the whole act and duty of registration, for it is a single act and duty, and its severance into distinct parts, for which distinct and separate fees may be charged, is not in consonance with the words or spirit of the statute. If a separate fee of fifty cents for the certificate of registration may be charged, there can be no reason for withholding a like fee, for the endorsement of the day and year of the delivery of the conveyances for record. Though this endorsement is not in the statute called a certificate, such is its legal effect and operation—it is a writing a public officer is required to make, and of itself legal evidence of a fact. All the effect of registration as notice, attaches from the day of the delivery of the conveyances to the probate judge for registration, of which this endorsement is evidence. *McGregor v. Hall*, 3 St. & Por. 397; *Dubose v. Young*, 10 Ala. 365. Again, there can be no reason for denying the probate judge compensation at the rate of twenty cents per hundred words for recording the certificate, if he is entitled to the fee for making it, and thus double compensation is allowed him. The true construction of the statute is what we have indicated, that the fee for registration is twenty cents per hundred words, embracing all the service the judge is required to render. Conveyances are often of property of but small value, or intended as security for small debts. Or they may be very short, not embracing more than two hundred and fifty words. There would be no just proportion between the charges for registration and the certificate in such cases; and in the former class individuals would be subjected to burthens we cannot suppose it was the legislative intent to impose.

Let the judgment of the City Court be reversed, and the cause remanded.

[Henderson's Adm'r v. Henderson's Heirs.]

58	582
95	237
58	582
142	438

Henderson's Adm'r v. Henderson's Heirs, &c.

Proceedings in Probate Court to Settlement of Administration.

Administrator commingling funds of estate with his own; when accountable as for conversion.—Where an administrator commingles funds of an estate with his own, so that the separate identity of the trust fund cannot be traced—as by depositing and keeping such money in bank, in his own name, with his own funds—he is accountable to the beneficiaries, at their option, as for a conversion; and this settled rule cannot be disturbed, however oppressive its operation may be in the particular case, or however pure the intention with which such deposit was made.

APPEAL from the Probate Court of Macon.

In the matter of Lemuel Henderson, administrator of the estate of John C. Henderson, against the heirs and creditors of John C. Henderson, the probate judge being incompetent, the Register in Chancery presided, and the following proceedings were had:

Said administrator moved the court to proceed to audit and allow his account as follows: "Lemuel Henderson, administrator of the estate of John C. Henderson, deceased, in account for final settlement of said estate, under a decree of insolvency rendered June 10th, 1867. Administrator first reporting that he did heretofore make a final settlement of his administration with the probate court of Macon county, but which settlement seems not to have been recorded, and no decree being found among the minutes of the court thereon, now submits the following account as a settlement of the same:

Administrator charges himself with amount reserved on partial settlement by order of the probate court of Macon county, in bank bills, May, 1861.....	\$1,000 00
Interest	855 02

\$1,855 02

Administrator asks credit for amount funded in Confederate bonds, and which perished on his hands (disallowed). \$1,000 00

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Taxes.....	125 00
Printer's fees.....	4 00
Administrator's commissions.....	50 00

RECAPITULATION.

Amount of assets.....	\$1,855 02
Amount of credits allowed.....	279 00

Due by administrator.....\$1,576 02

In support of said account, he introduced proof that, in May, 1861, he made a partial settlement of said estate with said probate court, and the court ordered him to retain in his hand, from the assets of said estate, the sum of one thousand dollars, to await the result of a suit pending in the Circuit Court of Macon county, against said estate for about said sum, which was accordingly done. The sum retained consisted of bills upon the Central Bank of Alabama, and other banks of Alabama, not now remembered, together with some bills on the Bank of Charleston, South Carolina; that this money was deposited with the Tuskegee Insurance Company, which company was doing a banking business. He also, about the same time, deposited with said insurance company, several thousand dollars of similar funds of his own. That said suit in the Circuit Court did not terminate until March 14th, 1867; that during its pendency the said deposit remained undisturbed until sometime in 1864, when he received a notice from said company that they had suspended operations, and to come and draw out his deposit. He went and received for himself individually, and as administrator, Confederate States treasury notes for said deposits. He testified that he then considered said Confederate notes of equal, if not greater, value than the bank bills originally deposited, and acted in good faith and honestly believed he was promoting the interest of the estate thereby; that he acted with, and took care of, said funds just as he did with his own; that he never used any of said funds for himself in any manner; that after he received said funds he advised with an attorney, of good standing, what course to pursue; said attorney advised him to fund them in Confederate bonds, and he did so—with his own money and that of said estate, and of another estate of which he was administrator.

The books of said Tuskegee Insurance Company were put in evidence, showing the following account of said Henderson :

[Henderson's Adm'r v. Henderson's Heirs.]

LEMUEL HENDERSON.

1860. June 2, To ck, \$1500 00	Jan. 2, By bal. \$2,075 00
" " 23, " dep't 233 80	Jan. 25, " dep't 1,100 00
1861. June 14, " ck 412 55	Feb. 11, " " 435 00
" July 10, " " 300 00	Ap'l 12, " " 238 80
1862. Sept. 10, " " 400 00	1863.
1863. Ap'l 27, " " 1165 00	Ap'l 20, " " 1165 00
1864. " " 600 00	
for bonds, 400 00	

The foregoing was substantially all the evidence in the case, except as to certain evidence showing the good faith of said Henderson in receiving Confederate money for the bank bills, and the value of said bills, &c.

The court rendered its decree, refusing to allow the administrator a credit of the amount funded in Confederate bonds, and also charged the appellant with interest. This decree, together with immaterial rulings on the evidence, is now assigned as error.

ABERCROMBIE & GRAHAM, for appellant.—From the proof shown, the court erred in charging the administrator with the amount funded by him in Confederate bonds. Executors and administrators acting in good faith, will be protected, and their conduct will not be subjected to such rigid rules as to deter all prudent men from assuming fiduciary relations.—*Gould v. Hays et al.* 19 Ala. 438, and authorities there cited; *Lowry & Bates v. Ferguson*, June term, 1877. The appellant acted the same with his own funds as with those of the estate.—See what the court says in *Key v. Jones*, 52 Ala. 248.

DAVID CLOPTON, and J. A. BILBRO, *contra*.—(No brief came to Reporter.)

STONE, J.—The case of *DeJarnette v. DeJarnette*, 41 Ala. 708, was conceded to be a hard case. Yet, because the trustee had commingled the trust funds with his own, so that the separate identity of the former could not be traced, he was held accountable for them as for a conversion, at the option of the beneficiary. That principle was fortified by a citation of authorities which we need not repeat here.—See, also, *McLeroy v. Thompson*, 42 Ala. 656. And it has been repeatedly held that if a trustee deposits trust funds in his own individual name, to his own individual credit, blended

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with his own private funds, this constitutes a commingling of the funds within the rule declared above.

The deposit account of appellant, which was put in evidence, shows that when he made his annual settlement in May, 1861, he had to his individual credit with the insurance company a deposit of about \$2,300. He had no account as administrator. He had made no deposit within a year before, and he made no new deposit till April, 1863. Of the \$2,300 to his credit in May, 1861, he drew \$1,300 during the months of June and July, 1861, and September, 1862. This balance remained to his individual credit until 1864, when he checked it out. The loss, with which he seeks to charge the estate, according to the proof, was \$1,000 of this \$2,300. However oppressive it may seem under the facts of this case, the administrator cannot, under the long settled rules of law, obtain the credit he claims.

The testimony objected to was wholly immaterial, and did no harm.

Affirmed.

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Motion to Confirm Report of Register as to Sale of Lands, and Exceptions thereto.

Sale of lands by register ; when not set aside as being premature, or because decree fails to designate place of sale.—In a suit in chancery to subject lands to the payment of debts, a consent decree was rendered in June, 1875, ascertaining the amount of indebtedness entitled to a lien on the land, and directing that the register proceed "upon or after the 15th day of Nov'r next, to sell the lands for cash at public outcry to the highest bidder, after first giving notice of the time and place, and terms of sale, by publication" in a designated newspaper for three weeks, &c. The decree also contained this further stipulation: "If, before the 15th day of November, 1875, the defendants shall pay the costs of this suit, and \$200, to be applied *pro rata* on debts due complainants, then the sale of said lands shall be stayed until the 15th day of November, 1876, when the sale shall take place upon the same terms and conditions as above provided, unless the defendants shall before that time pay" another given sum, &c. The decree further directed, if the register should fail to advertise and sell the lands "on any of the days herein mentioned on which he is directed to sell, he shall do so as early thereafter as convenient, and if the defendants fail to pay any of the amounts herein specified, there shall be no further delay, &c. The register having first made publication as directed in the order, &c., exposed the lands for sale at public outcry at the court-house door of the county in which the lands were situate, and the court was held, on the 15th day of November, 1875, and executed a conveyance to the purchaser, who was the highest bidder. Upon the coming in of his report showing these facts, and certifying the failure of the defendants to comply with the terms of the order of sale, the defendants excepted to the report, &c., because the sale was pre-

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maturely made, and because no place of sale was designated in the decree, and the Chancellor refused to confirm the report and set aside the sale, on the ground that it was prematurely made. *Held* :

1. The effect of the stipulation for a stay of sale was to confer on defendants the right to a further stay to a given day, beyond that fixed in the order, upon making payment as therein provided "before the 15th day of November, 1875," and not having made payment before that time, a sale on that day (proper advertisement first having been made) was authorized by the decree; and although defendants had the legal right, independent of the stipulations of the decree, to stop the sale at any time before it was actually made, upon paying the debt and costs, this right, in the absence of such payment or tender, could not affect the validity of the sale made on the day named in the decree.

2. A sale of lands, made after due advertisement and in the usual manner of judicial sales, at the court-house door of the county where the lands lie, will not be set aside, merely because the decree is silent as to the place where the sale is to be made.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. N. S. GRAHAM.

On the 11th of June, 1875, the appellants, G. D. Hooper and another, obtained, on a bill to subject lands to payment of debts secured by mortgage, a consent decree against appellees, Wm. C. Younge, and another, ascertaining the several amounts due complainants (appellants), by defendants (appellees). The decree states that "it is further ordered, adjudged and decreed that the register proceed upon or after the 15th day of November, 1875, to sell the lands described in the mortgage, attached to complainants' bill, for cash at public outcry to the highest bidder, after first giving notice of the time, place and terms of said sale, by publication in the Opelika Observer, a newspaper published in Opelika, Lee county, Ala., for three successive weeks, and shall apply the proceeds of said sale to the payment, &c.

And it is further adjudged and decreed, that if, before the 15th of November, 1875, the said defendants shall pay the costs of this suit, and two hundred dollars, to be applied *pro rata*, on the debts due complainants, then the sale of said land shall be stayed until the 15th of November, 1876, when said sale shall take place in the same manner, and upon the same terms above provided, unless the defendants shall, before that time, have paid four hundred dollars on the amount above ascertained to be due the complainants, in addition to the \$200, &c. . . . That if the register should fail to advertise and sell said land on any of the days herein mentioned, on which he is directed to sell, he shall do so at as early a time after said days mentioned as may be convenient; and if the defendants fail to pay any of the amounts herein specified, then no further delay shall be had in regard to the sale of said lands," &c.

On the 29th of November, 1875, the register reported to

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said court, that "in pursuance of said decree, and the defendants having wholly failed and refused to comply with the requirements thereof within the time specified, I did, on Monday, the 15th day of November, 1875, after advertising the time, place and terms of sale, in compliance with said decree, sell at public outcry at the court-house door of Opelika, &c., the following described land, to-wit—(the same as mentioned in the decree.) . . . I further certify that the purchasers having complied with the terms of said sale, I executed to them a deed to said land."

On the 30th of November, 1875, the appellees filed the following exceptions to said report, and asked that the said sale be set aside for the following reasons: 1st, the report shows that said sale was made at an earlier day than the decree allowed; 2d, the report shows that the sale was made at the court-house door of Opelika, while the decree designates no place at which the sale should be made; 3d, the decree, failing to designate a place of sale, the said sale at said court-house door was unauthorized; 4th, that no legal sale was ever had.

The cause coming up to be heard on motion of defendants to set aside said sale and exceptions to register's report, the Chancellor sustained the first exception of defendant and ordered that the sale be set aside and the deed made by said register be annulled, and adjudged that "said decree stands in all respects as if said sale had never been made." The refusal of the Chancellor to confirm the sale and his decree sustaining the first exception of defendants, is now assigned as error.

G. D. & G. W. HOOPER, for appellants.—1. The Chancery Court had authority by its decree of the 11th of June, 1875, to order the register to sell the mortgaged lands, upon the 15th day of November, 1875. And the words, "The register *proceed upon or after* the 15th day of November, 1875, to sell the lands *after* first giving notice," means that "the register shall, upon or after the 15th of November, 1875, sell the lands," &c. The word "proceed," we accept as being equivalent to "*go forward*"—from the latin *pro* and *cedo*, and we approve the register's action in *going forward*, as he did, and selling on the day specified. The construction of the decree is that it meant a *sale on* the said day; the advertising was preliminary and not part of the sale.

2. As to the point that no sale can be had under the decree of 11th June, 1875, because no place was named, (decided in our favor by the Chancellor), we say the decree is by consent, and therein the parties chose by consent to leave

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it to the discretion of the register. It is the usual course to leave the selection of the place to the register, even without consent.—See Forms in Daniel's Ch. Prac.; *Richardson v. Holms*, 18 How. 147, and cases there cited; Rorer on Judicial Sales, 53; see, also, *Brown v. Brown*, 41 Ala.

F. M. WOOD, with whom were SAMFORD and DOWDELL, *contra*.—1. Was the sale premature? It was, for two reasons: 1st. Because defendants had the whole of the 15th of November within which to pay the first installment. In computing time, the last day must always be excluded.—Rev. Code, § 14; *Field et al. v. Gamble*, 47 Ala. 443. 2d. The sale was premature, because no action could be taken by the register under the decree prior to the 15th of November.

2. *Advertising* the land for sale was the first step in the *process* of sale. The register did this several weeks before the 15th of November, in the face of the decree which ordered him to *proceed, i. e. move in the steps necessary to make the sale*, on or after that day; in no event before.

3. The terms of sale, and the place, the Chancellor alone has the power to designate. From this source and none other, must the register acquire the right to designate the place at which the sale must be made. Such right is conferred exclusively on the Chancellor at common law. The case of *Brown v. Brown*, (41 Ala. 215) is strikingly analogous. In probate court sales, the law has conferred on the judge of probate the power to name the place of sale. This exclusive power conferred on the judge of probate by statute, in cases arising in his court, is conferred exclusively on the Chancellor by the common law in cases in courts of equity.

STONE, J.—The able and well-considered opinion of the Chancellor makes a plausible case for holding that the sale on November 15th, 1875, was premature. We feel constrained, however, to hold that in this he erred. The original consent decree of June 11th, 1875, first ascertained the several amounts due complainants, with a stay of the execution of the decree till November 15, 1875. Its language is: "It is therefore ordered, adjudged and decreed that the register proceed on or after the 15th day of November, 1875, to sell the lands described in the mortgage," &c. If the decree had rested on what is stated above, and had not contained the provisions after stated, no one would doubt that the advertisement might precede, and the sale be made on the 15th November. It was the sale which was postponed to that day, not the advertisement. The fifteenth day of November, 1875, fell on Monday, and the effect of the decree

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was that the register, "after first giving notice of the time, place and terms of said sale, . . . for three successive weeks," might proceed to sell, "upon or after the 15th day of November, 1875," &c. We repeat, if the decree contained no clause or words which qualify or limit this general authority to sell, no one would question the right to sell *on* the 15th day of November.

But the decree does contain a limitation on this general authority to sell, inserted obviously for the accommodation and benefit of the defendants. It was conditional in its terms, and operates as a contingent defeasance of the previously conferred authority and right. It was a privilege granted to the defendants to obtain further delay in the execution of the decree, by making partial payment "before the 15th day of November, 1875." Its language is, "If before the 15th day of November, 1875, the said defendants shall pay the costs of this suit and two hundred dollars, . . . then the sale of said land shall be stayed until the 15th day of November, 1876, when said sale shall take place in the same manner and upon the same terms," &c. There were then added other provisions, precisely like the last, for further extension of the day of sale, on making designated partial payments by the defendants. Neither of said conditional provisions varied from the language copied above; and, in each case, the 15th day of November is the named day, *when*, or, *at which time*, the sale was to take place. The last paragraph of the decree is in the following language: "That if the register should fail to advertise and sell said land on any of the days herein mentioned, on which he is directed to sell, he shall do so at as early a time after said days mentioned as may be convenient; and if the defendants fail to pay any of the amounts herein specified, then no further delay shall be had in regard to the sale of said lands," &c.

It will be observed that the language of the decree is, if the defendants pay "before the 15th day of November." The meaning of the word 'before' in this connection, is *earlier than, previous to*. It confers no right to pay *on* the 15th of November, and thus secure the right to further extension. To claim that, as matter of right, the defendants must have paid earlier than—previous to—the 15th day of November. This was matter of contract, expressed in the decree; and not a mere legal construction of the usual decree to sell. True, the defendants had the right to pay, and thus stop the sale, up to the very moment when the property was sold; but it was not a right growing out of the conditions above expressed. It was but the common right of all judgment or execution debtors, to pay the money demanded, and thus

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prevent the sale of their property; for, in such cases, payment of the money is a finality. But, to have this effect, the payment, if made on the 15th, must not simply be of the \$200 and costs. It must be of the entire decree and costs. We hold that the decree in the present case gave to the register the general power to sell on the 15th day of November, with a privilege to the defendants to arrest the sale—not the advertisement—by making a specified partial payment *before* the 15th. We hold that the register's sale was not prematurely made.

There is nothing in the cross assignment of error. The decree of the Chancellor being silent as to the place of sale, it was the duty of the register to sell the lands at the door of the court-house.—*Matheson v. Mearin*, 29 Ala. 210.

On the cross assignment of errors, we concur with the Chancellor in holding that the sale should not be set aside, by reason of the failure of the decree to designate the place of sale.

The decree of the Chancellor, setting aside the sale as prematurely made, is reversed, and a decree here rendered, confirming the sale made by the register. Let the costs be paid by the appellee.

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Action of Detinue.

58	590
95	443
58	590
99	577
58	590
122	579

1. *The gist of the action of detinue* is the wrongful detainer, and not the original taking.

2. *Detinue; possession in defendant necessary to maintain action of.*—To maintain the action of detinue it must be shown that the defendant, at the time the writ was sued out, had the actual possession, or the controlling power, over the property, for the reason that he may surrender the possession if he elect to do so.

3. *Same; when detinue properly brought.*—Where property had been taken from the possession of defendant, under a search warrant, and brought to the justice of the peace who issued the warrant, who, on hearing, discharged the seizure and directed the sheriff to restore the property to defendant, and suit in detinue was then brought, but before the property had actually reached the defendant's possession,—*held*, that the defendant must be regarded as having power or control over the property, and, therefore, the suit was rightly brought.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAMES E. COBB.

This was an action of detinue brought by W. W. Felts, administrator of the estate of one Boston Swanson, against

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Lemuel Henderson, appellant, on the 26th of September, 1876. The defendant pleaded the general issue in short by consent.

On the trial, the plaintiff introduced in evidence the papers and record of a suit in detinue, instituted by the defendant Henderson, against the plaintiff's intestate,—the said Swanson—for the property sued for in this action, by which it appeared that said last named suit was begun on the 4th day of January, 1876. Plaintiff also introduced in evidence a replevy bond, executed by said Swanson, deceased, and others as his sureties, for said property, and proved that on the execution, delivery and approval of said bond, the property sued for was placed in his possession by the sheriff as the law required. He proved the value of said property—a mule and horse—and then introduced proof going to show that after the death of said Swanson,—the defendant in the original suit—and while said suit was pending—Henderson obtained possession of the property in dispute, by means of a search warrant issued by a magistrate, or notary public, of Tuskegee beat; that after said property was brought before the said magistrate, and an investigation had, the magistrate ordered the same to be returned to the custody and possession of Henderson. The officer, who executed the process, testified that, upon taking the property—as ordered by the magistrate—to the premises of Henderson, who lived some eight or ten miles from Tuskegee, he informed Henderson that he came to deliver the property to him, and asked what he should do with them—the horse and mule. Henderson requested him to turn them into the lot; that he (the officer) replied that it was not worth while to do so, as he had papers with him by which he was required again to take possession of the horse and mule; and then served Henderson with a copy of the complaint in this cause; and upon the latter declining to execute bond, he (the officer) brought the horse and mule away with him.

The defendant introduced the record, showing the dismissal of the suit of *Henderson v. Swanson*, on the 15th of December, 1876.

The court then charged the jury as follows: 1st. "If the jury believe from the evidence, that the justice of the peace, or notary public, upon the trial of the proceedings under such warrant, had ordered the property in dispute into the possession of defendant, then such order had the effect of investing the defendant with the possession, and that the possession of the property by the officer charged with the execution of said order, was the possession of the defendant, and that detinue against the defendant could be commenced

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on such possession." 2d. "That if the jury believe from the evidence that Henderson had sued plaintiff's intestate, in detinue for the property in dispute in this action, and that plaintiff's intestate had replevied said property, by giving bond according to law, and was in possession of said property at his death, holding the same under and by virtue of his said replevy bond; and if they further believe from the evidence that Henderson took forcible possession of said property, while said suit by him against plaintiff's intestate was pending, and that this suit was commenced before the said suit of Henderson against plaintiff's intestate was dismissed or otherwise disposed of, the plaintiff's right to recover could not be affected by the dismissal of said suit after the commencement of this action."

The defendant reserved exceptions to each of said charges, and now assigns the giving of them as error.

J. B. PAINE, for appellant.—1. In *McArthur v. Carrie's Adm'r*, 32 Ala., the court held, that the charge of the court below, in reference to the possession of the sheriff being the possession of the plaintiff, was incorrect, and said "we think it clear that if the sheriff, under instructions from the plaintiff or her attorney, discharged the first levy before the second writ was sued out, that placed the slaves under the legal control of the plaintiff, and on this point justified the institution of the second suit. After such discharge of the levy, the sheriff's possession ceased to be in his official character, and he held the slaves as the naked bailee of the plaintiff. "In the case at bar, the sheriff still held the property in his official character; he was charged by the court with the performance of an official act in reference to it, and until that act was performed his official duty did not end. The appellant had neither the actual possession, at the time the writ was sued out, or the controlling power over the property. He had been dispossessed by legal process, and, so long as the property was held under that process, the sheriff had a special property in it, and the plaintiff did not have a controlling power over it."—*McArthur v. Carrie's Adm'r*, 32 Ala.

2. Would not the sheriff be liable in his official capacity, if, while holding the property under the magistrate's order, he had converted it, or otherwise unlawfully disposed of it? The defendant could not comply with a demand for the property at the time the writ was sued out; the possession was not in him, either actually or constructively.

3. The authorities all show that to maintain detinue there must be either actual possession, or controlling power over

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the property, in the defendant.—*Walker v. Flinn*, 20 Ala.; *Foster v. Chamberlain*, 41 Ala. 158; 48 Ala. 517, &c. If the sheriff's possession was not the possession of the plaintiff, then the record shows that he had no possession at the commencement of the suit.

4. The court erred in its second charge to the jury—the charge is abstract and not based upon the facts in evidence as shown by the record, and was productive of injury to the plaintiff. The gist of the action of detinue is the wrongful detainer, and it is not material whether the defendant came into possession rightfully or wrongfully.—*Paine v. Hill*, 9 Port. 151.

ABERCROMBIE & GRAHAM, *contra*.—1. There was no error in the first charge of the court below to which appellant excepted.—*McArthur v. Carrie's Adm'r*, 32 Ala. 75.

2. Felts, the appellee, who was the plaintiff in the court below, clearly had the right to the possession of the property sued for at the commencement of his suit, as the legal representative of Boston Swanson, (Code, § 2942), and could, at that time, have maintained his action. The only plea interposed by Henderson was the general issue, which was simply a general denial of the cause of action at the time of the commencement of the suit. The dismissal of the original action of Henderson against Boston Swanson, subsequently to that term, if a good defense at all, should have been specially pleaded, and could not have been made available under the plea of the general issue.—Code, § 2988.

STONE, J.—1. The gist of the action of detinue is the wrongful detainer, and not the original taking.—1 Saund. Pl. & Ev. 436.

2. It is said that to maintain the action, it must be shown the defendant, at the time the suit was sued out, had the actual possession, or the controlling power over the property. *Walker v. Flinn*, 20 Ala. 192. The reason given why it is required that the defendant in such action must have the possession, or power of control, at the time of demand or suit brought, is that he may surrender the possession, if he elects to do so. If out of possession by himself or bailee, he can not surrender possession; and hence, the action can not be maintained against him. "It is generally, therefore, incumbent on a plaintiff in this action, after showing that he has an absolute or special property, and also a right to the immediate possession, also to show an actual possession or a general controlling power over the chattel by the defendant,

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at the date of the suit."—*Charles v. Elliott*, 4 Dev. & Bat. 468.

3. In the present case the property had been taken from the possession of Henderson, the defendant, under a search warrant, and brought to the justice or notary public who had issued the warrant. On hearing the evidence he discharged the seizure, and directed the sheriff to restore the property to Henderson.—Code of 1876, § 4021. The property had not in fact reached the defendant's possession when the writ in detinue was sued out. In *McArthur v. Carrie*, 32 Ala. 75, 88, it was said, "We think it clear that if the sheriff, under instructions from plaintiff, or her attorney, discharged the first levy before the second writ was sued out, this placed the slaves under the legal control of the defendant, and, on this point, justified the institution of the suit. After such discharge of the levy, the sheriff's possession ceased to be in his official character, and he held the slaves as the naked bailee of the defendant." We can not perceive any real difference between the question raised in *McArthur v. Carrie*, *supra*, and the question presented by this record. We think Henderson must be regarded as having power of control over the chattels sued for, and that the action was rightly brought against him. The rulings of the Circuit Court were in accordance with these views, and the judgment is affirmed.

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Action to Recover Damages for Stock Killed.

1. *Legislative act; prima facie presumption as to constitutionality of.*—In pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government—the legislative department—this court will indulge the presumption that such act is constitutional, until clearly convinced to the contrary.

2. *Same; when void for creating liability not in "due process" of law.*—An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when, under the general law of the land, no one else is so liable under such circumstances, does not provide the "due process of law," under § 7 of the bill of rights, and is, therefore, void.

3. *Section 1704, Code of 1876, not distinguishable from act of 1877; what not a fair interpretation of the language.*—The "act to define and regulate the liabilities of railroad companies," approved Feb. 11, 1852, and carried from the Revised Code into the Code of 1876, as section 1704, is not distinguishable in

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principle from the similar provision in the act of 1877; and although in the case of the *Nashville & Chattanooga R. R. Co. v. Peacock*, (25 Ala. 229), it was held that the liability was not absolute, but that circumstances tending to show that the killing was the result of accident, which could not have been avoided by the exercise of skill and care, could be shown in defense, such is not a fair and natural interpretation of the language.

4. *Sections of Code repealed by other sections.*—Likewise, it seems that the act of 1877, sections 1710-1715, inclusive, of the Code of 1876, necessarily superseded and repealed sections 1704 to 1709 of the same Code.

5. *Due process of law; definition.*—"Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony, or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

APPEAL from the Circuit Court of Elmore.

Tried before the Hon. JAMES Q. SMITH.

This was an action brought on the 25th of September, 1877, by S. B. Zeigler, the appellant, against the South & North Alabama Railroad Company—a corporation chartered under an act of the legislature approved February the 15th, 1854—to recover \$50.06 damages, as the complainant alleges, "for killing a yearling calf, the property of plaintiff (appellant), near Zeigler's crossing on defendant's railroad in said county, by running over or striking said yearling, by a locomotive or engine, &c., in employ of said company, on the 27th day of May, 1877." The defendant's counsel demurred, in short, by consent, to the complaint, and assigned as grounds of demurrer: 1st. It is not alleged that the killing of the yearling was occasioned by any default, negligence or omission of duty on the part of defendant, its servants, agents, or employees. 2d. The complaint does not show that defendant, its servants, agents, or employees, were guilty of any negligence or fault, or that said killing was occasioned by any fault, negligence, or failure of duty on part of defendant, its servants, agents, or employees. 3d. The act to define and regulate the responsibility of railroads for damages to live stock, or cattle of any kind, approved Feb. 3d, 1877, upon which said complaint is based, is unconstitutional and void. 4th. Said act impairs the franchise of defendant, given by its charter, and is therefore void.

The demurrer was sustained, and leave given to amend the complaint so as to show that the cause of action arose and was occasioned by reason of defendant's negligence. Issue was joined upon the amended complaint.

The case was submitted to the jury upon an agreed statement of the facts which, from the view taken of the case, need not be noted.

The defendant's counsel requested the court, in writing, to

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give the following charges: 1st. The act to define and regulate the responsibility of railroads for damages to live stock, or cattle of any kind, approved February 3d, 1877, is unconstitutional and void. 2d. Said act impairs the franchise granted to defendant by its charter, and is, therefore, violative of the Constitution of the United States, and void; which charges the court gave, and plaintiff excepted.

The ruling of the court in sustaining the demurrer, and giving said charges, is now assigned as error.

H. C. BULLOCK, for appellant.

RICE, JONES & WILEY, *contra*.

No briefs came to Reporter.

• STONE, J.—1. In pronouncing on the constitutionality of an act of the legislature, the court necessarily passes judgment on the legality of an act which has received the sanction of a co-ordinate department of the government. Hence, the courts approach such inquiry with a due sense of its magnitude and solemnity, and indulge the presumption that the enactment in question is constitutional, until clearly convinced to the contrary.—See *Sadler v. Langham*, 36 Ala. 311.

2. The only question of importance presented by this record, arises on the constitutionality *vel non* of the first section of the act "To define and regulate the responsibility of railroads for damage to live stock or cattle of any kind," approved February 3, 1877.—Pamph. Acts, 54. That section enacts, "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this State, shall be liable for all damages to live stock, or cattle of any kind, caused by locomotives or railroad cars." This statute declares that railroad corporations shall be liable, and make compensation to the owner, for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person owning such live stock contribute to the injury; but permitting live stock to run at large, shall not be considered as contributing to such injury.—Section 3 of the act. It is obvious that under this statute, the highest diligence could not avoid frequent injuries to live stock,

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for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown, to authorize a recovery: ownership of the property, and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this "due process of law," under section 7 of the declaration of rights?

3. The act "To define and regulate the liability of railroad companies," approved February 10, 1852—Pamph. Acts, 45—is not distinguishable, on the question we are considering, from the act of 1877, *supra*. In *Nashville & Chat. R. R. Co. v. Peacock*, 25 Ala. 229, that statute came up for consideration, but the constitutionality of the act was not questioned in argument, or considered by the court. Our predecessor, however, did not interpret the statute as fixing inevitable liability on the railroad, whether the officers did their duty or not. The court said, "If there are any circumstances which tend to show that the killing was the result of accident, which could not have been controlled by the company by the exercise of the greatest degree of diligence and care on the part of their agents, this may be shown in defense; and if this is not satisfactorily done, the plaintiff is entitled to recover." The result of this ruling was to hold that the fact of injury to live stock by a railroad train, created only a *prima facie* liability. We do not think this was a fair and natural interpretation of the language employed by the legislature. They intended to declare an absolute liability.

4. In *Memphis & Charleston Railroad Co. v. Bibb*, 37 Ala. 699, we considered the act of February 10, 1852, *supra*, in connection with the later statute, February 6, 1858, and held that the latter enactment repealed the former so far, as to leave it for the jury to determine whether damage to stock, caused by the train, was chargeable to negligence or failure to conform to statutory requirements on the part of the railroad employees. Still, the first section of the act of 1852 was carried into, and constitutes section 1406 of the Revised Code, and is made section 1704 of the Code of 1876. And the first section of the act of February 3, 1877, copied above, is also carried into the Code of 1876, and constitutes section 1710 of said Code. It would seem that the act of 1877, sections 1710-11-12-13-14-15 of the Code of 1876, necessarily superceded and repealed sections 1704-5-6-7-8-9 of the same Code.

5. Judge Cooley, in his work on Constitutional Limitations, quotes with commendation the powerful and lucid definition

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of the phrase, 'due process of law,' as given by Mr. Webster in the great case of *Dartmouth College v. Woodward*, 4 Wheat. 518, 581, as follows: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. . . . Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country." In another place, during the same argument, speaking of the powers of the legislature, and their separation from the judicial functions of the government, he said, "It [the legislature] shall not judge by *act*; it shall not decide by *act*; it shall not deprive by *act*; but it shall leave all these things to be tried and adjudged by the law of the land."

In the case of *Hoke v. Henderson*, 4 Dev. Law, 1, 15, Chief Justice RUFFIN said, "The terms, 'law of the land,' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life, without crime? Yet all this he may suffer, if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be, in itself, a law of the land within the sense of the constitution; for what is, in that sense, the law of the land, must be duly observed by all, and enforced by the courts. . . . The clause itself means that such legislative acts, as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes."

"Due process of law undoubtedly means, in the due course
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of legal proceedings, according to those rules and forms which have been established for the protection of private rights. They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."—Cooley Cons. Lim. 355.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But, at the same time, we decided that the legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.'—See *Stoudenmire v. Brown*, 48 Ala. 699; *Davis v. Minge*, 56 Ala. 121; *Oliver v. Robinson*, at present term.

We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employes; an injury, which no human prudence or foresight could prevent; and yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short of due process of law. We have heretofore declared a rule which exacts from railroad corporations a high degree of skill and diligence, to prevent injury to persons and property.—See *Tanner v. Louisville & Nashville R. R. Co.*; *Sav. & Memph. R. R. Co. v. Shearer*, and *S. & N. R. R. Co. v. Sullivan*, at the present term. We have no wish to modify that rule. But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert.

It results, from what we have said above, that the Circuit

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Court did not err in sustaining the demurrer to the complaint as first filed, and did not err in the charges given.

Affirmed.

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Action of Trespass quare clausum fregit.

1. *Ejectment commenced against parties in possession.*—Ejectment is a possessory action, and since it operates only on the possession, it must be commenced against the person in possession.

2. *Same; defendants to action; who affected by judgment.*—If the tenant in possession is not made a defendant, he can not be ejected under a writ of *habere facias*, issued on the judgment; and if the tenant only is sued, the judgment against him is not evidence against his landlord, unless the latter was joined with the tenant in defense; but all persons who enter into possession pending the suit, are bound by the judgment; and if the landlord, not being made a defendant, receives possession, pending the suit, from the tenant, who alone is sued out, he (the landlord) may be turned out under the writ of possession.

3. *Authority of attorney to superintend execution of process.*—In this State an attorney has a general authority to superintend and direct the execution of process issued on judgments which he has obtained for his clients, and may lawfully give such instructions to the officer executing it, as could be given by his client, and the process will protect him to the extent that it would protect his client.

4. *Action joint or several, against several trespassers.*—If several persons commit a trespass, the injured party may sue them jointly or severally; yet he can have but one satisfaction.

6. *Same; satisfaction by one trespasser as affecting others.*—A release to one joint trespasser, or acceptance of satisfaction from one, discharges all; but an acceptance of partial satisfaction from one, and a receipt or release to that extent, (having effect according to the intention of the parties, Rev. Code, § 2635,) is only available to the other defendants as partial satisfaction.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This was an action of trespass, *quare clausum fregit*, brought by appellee, Amaranth L. Gayle, against appellants, James Q. Smith and Thomas W. Armstrong. The complaint is in the usual form, with some circumstances of aggravation alleged. Pleas *puis darrein continuance*, were interposed to said complaint, to which pleas the plaintiffs filed a replication. Demurrers to the replication were interposed and overruled, and issue was then taken on the replication.

The appellee was the widow of one Matt. Gayle, who died in 1867. During and since her marriage, she had occupied the premises described in the complaint, and no dower had been assigned her as the widow of said Matt. Gayle. One L. J. Bryan, as U. S. Deputy Marshal, in June, 1867,

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had in hand, from the U. S. District Court for the Middle District of Alabama, a writ of possession, which was produced, commanding him to "deliver to John W. Harper possession of the lands and tenements recovered of Peyton S. Graves, George W. Gayle and M. H. Scoggins, by judgment in said court, at the spring term commencing in May, 1867; (which lands are the same as described in the complaint.)" The writ further commanded said deputy, to have made out of the goods and chattels, lands and tenements, of said parties, the sum of damages and costs. Said deputy went, with one Thomas W. Armstrong, to execute said writ and deliver the possession of said premises to Armstrong as the agent of said Harper. The plaintiff was occupying the dwelling house on said lands—also, said Scoggins, one of the defendants. Said deputy informed the appellant (plaintiff), that he was such deputy, and had come in that capacity to take possession and deliver the premises to said Armstrong, as the agent of Harper; and handed her said writ, but she refused to surrender possession. Said deputy then went to Montgomery to see defendant Smith, the attorney of Harper, and get instructions. Whereupon, Smith wrote the following: "Permit Mrs. Gayle to occupy sufficient rooms in the dwelling house—the balance to be delivered up to Scoggins and Armstrong, with keys. Get possession of the office, move out the furniture, and deliver possession and the keys to Armstrong. Get keys of warehouse and deliver same to Armstrong. Take list of articles there until I notify owner to take them away." The deputy asked Smith what he should do if resisted, and Smith replied, "You must execute the writ." With these instructions and the writ, said deputy went, in company with Armstrong and another party, the next day, and showed the plaintiff his instructions, and she refused to surrender, but said that if said deputy came to use force—said deputy replying that he was prepared to use force if necessary—she would yield. Upon this the furniture was removed and the instructions of Smith carried out. Plaintiff's furniture was removed and she left the same day. Armstrong took and remained in possession until the trial.

Defendants introduced in evidence the transcript from the U. S. Court of the recovery of judgment for said lands, as set out in the writ. They also introduced evidence tending to show that the plaintiff had rented (let) the premises, after her husband's death, to her son and another person "for the rest of the year 1867," and that they, as her tenants, were in possession at the time said suit of Harper was commenced in the U. S. Court, and also at the time said deputy levied his writ and took possession.

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Smith, as the attorney of Harper, was never on the premises, and had no further connection with the trespass than is shown above; said Armstrong was appointed by him as the agent of Harper, and he had no control over him after said appointment, nor had exercised any control over the premises. The defendants further introduced evidence of a bill filed by plaintiff against Harper and Armstrong, by which she recovered her dower in said premises. On the 3d day of February, 1876, said Harper paid her \$3,000, for which she executed an instrument releasing and giving up all claim to her interest, &c., in said premises, but not to prevent her from asserting or recovering in any suit, from said Armstrong, the difference between said \$3,000 and the amount of judgment recovered by her against said Harper and Armstrong.

The court charged the jury—the defendant excepting—that “the writ of possession in the hands of the deputy marshal did not authorize the defendant Smith or Armstrong to have Mrs. Gayle put out of possession of the premises.” The giving of which charge, with other rulings of the court, is now assigned as error.

RICE, JONES & WILEY, and ELMORE & GUNTER, for appellants.

1. The charge given by the court should have been refused. Smith's authority, as the attorney for the Harpers, continued for the purpose of controlling the process for the execution of the judgment.—*Albertson, Douglas & Co. v. Goldsby*, 28 Ala. 711. The charge ignored all the evidence in favor of defendants, and assumed as true every thing in favor of the plaintiff, and was calculated to mislead.

2. The general rule is, that a release to one of several co-debtors or co-obligors is a discharge of all, whether in judgment or not, and so of a satisfaction of the demand. This rule extends also to torts.—*Moreton's case*, Croke's Eliz. 30; *Cocke v. Jenner*, Hobart, (Mar.) 66; *Parker v. Lawrence*, Ib. 70; *Kiffin v. Willis*, 4 Mod. 379; *Knickerbocker v. Colver*, 8 Cow. 111; *Gould v. Gould*, 4 N. H. 173; *Abel v. Forgue*, 1 Root (Conn.) 502; *Brown v. Marsh*, 7 Vt. 327; *Eastman v. Grant*, 34 Ib. 387; *Gilpatrick v. Hunter*, 11 Shepley, 18; *Allen v. Craig*, 2 Gr. (N. J.) 102; *Benjamin v. McConnell*, 4 Gil. (Ill.) 536; *Rice v. Webster*, 18 Ill. 331; *Ellis v. Bitzer*, 2 Hane (Ohio), 293; *Ayre v. Ashmead*, 31 Conn. 447; *Stone v. Dickenson*, 7 Allen, 26.

3. As to the reservation in the release, and in the decree, to proceed against Armstrong to collect the balance of the joint decree, it is void. If a gift or grant be made, with a proviso or condition inconsistent with or repugnant to it, the

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proviso or condition is void. The same principle applies to a release.—*Benjamin v. McConnell*, 4 Gilman, 536; *Rice v. Webster*, 18 Ill. 331; *Ellis v. Bitzer*, 2 Hammond, 293; *Ayre v. Ashmead*, 31 Conn. 447; *Allen v. Craig*, 2 Green. 102.

4. There can be but one satisfaction for one trespass. Though committed by a dozen, it is still but one trespass.—*Layman v. Hendrix*, 1 Ala. 212; *Fire, Mar. Ins. Co. v. Cochran*, 27 Ala. 228.

T. H. WATTS and D. S. TROY, with whom was H. C. TOMPKINS, *contra*.—1. The charge given by the court was correct; there was nothing in the writ of possession which authorized the marshal to put Mrs. Gayle out of possession of the premises. The suit was not against her, the writ did not name her.—See *Gayle v. Smith et al.* June term, 1874.

2. Under the most favorable circumstances the defendants were only entitled to a deduction for the amount actually paid by Harper, viz: \$3,000.—See *Snow v. Chandler*, 10 N. H. 92, 94; *Chamberlin v. Murphy et al.* 41 Vt. 110–120; 1 Wat. on Trespass, p. 72, § 67, and notes on p. 73.

3. The settlement with Harper does not raise the question of release of the cause of action set forth in the complaint in this case.

4. The question whether the release operated as a full discharge to Armstrong of the amount of the decree in chancery or only to a satisfaction *pro tanto*, is not really now involved in this case. For the plaintiff, by order of the court, treated the payment of the \$3,000 as a full satisfaction of that decree, and, the decree thus satisfied, a *pro tanto* satisfaction of the damages plaintiff had a right to recover in this action of trespass. No damages except those resulting from the continued *use and occupation* of the premises were disputed, either by the pleas or by the charges asked. As to all other damages, there was no defense interposed by plea or by any charge refused. In this action of trespass the amount of the rents, income and profits, *could not be recovered*.—See Sedgwick on Damages, 148, and authorities cited.

5. In this case the pleas did not go in bar of the action, but the recovery of plaintiff in the chancery suit and the payment of the \$3,000 by Harper, were pleaded in mitigation of damages. The point made by appellant's counsel does not arise here, for the pleas did not raise the *issue* as to the effect of the release to Harper on this action of trespass *quare clausum fregit*.

BRICKELL, C. J.—This cause was before this court at the June term, 1874. The material question then presented

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and decided was, that the record of the judgment in the ejectment suit in the United States Circuit Court in favor of Harper against Graves, Scoggins and Gayle, who were tenants of the appellee, was not evidence against the appellee of the right of the plaintiff therein to recover, and the writ of possession issuing on that judgment did not authorize her ejectment from the premises.

The record now presents a different state of facts and a different question. The appellants, as we are informed by the bill of exceptions, introduced evidence tending to show that, prior to the institution of the ejectment suit, the appellee had rented the premises for the year 1867 to George Watt Gayle and Thomas F. Graves, who, with Scoggins, the other defendant in that suit, were in possession when the suit was commenced, when judgment was rendered therein, and when the writ of possession was executed by ejecting them and the appellee, the term of renting not having expired. The evidence on this point, the bill of exceptions states, was conflicting.

A recovery in ejectment, or in a real action under the Code, like judgments in personal actions, binds only parties and privies.—*Cheval v. Reinicker*, 11 Wheat. 280 (S. C. 2 Pet. 163); *Ainslie v. Mayor of New York*, 1 Barb. 168. A judgment against a tenant, is not evidence against the landlord, unless he was admitted to defend, or in fact joined with the tenant in making defense.—*Hunter v. Britts*, 3 Camp. 455; *Ryan v. Rippey*, 25 Wend. 432; *Leland v. Toney*, 6 Hill. 328. As between the parties, the effect of the judgment is to put the plaintiff in possession; the point decided is, that he has a title to the possession, better than that of either or all of the defendants.—*Atkins v. Horde*, 1 Burr. 113-114; *Chapman v. Armstead*, 4 Munf. 397. The action is possessory, and as it operates alone on the possession, it must be commenced against the parties in possession.—Tyler on Ejectment, 411; *Bonner v. Greenlee*, 6 Ala. 411. A tenant in possession, at and anterior to the commencement of the suit, if he is not made a party defendant to the suit, can not be ejected by the writ of possession, issuing on the judgment. He is a stranger to the judgment, and if in the execution of the writ of possession, he is ousted, the court from which the writ issues, will on proper application restore him.—*Ex parte Reynolds*, 1 Caines, 500; *Howard v. Kennedy*, 4 Ala. 592; *Hall v. Biliard*, 6 Ala. 43. But all persons entering under, or acquiring an interest from, or entering by collusion with the defendants, subsequent to the commencement of the suit, are privies bound by the judgment.—*Hickman v. Dale*, 7 Yerg. 149; *Waller v. Huff*, 3 Sneed, 82; *Jones v. Childs*, 2 Dana, 25; *Jackson*

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v. Tuttle, 9 Cowan, 233; *Howard v. Kennedy*, 4 Ala. 592. A landlord receiving possession from the tenant, *pendente lite*, is subject to be dispossessed by the writ of possession, which may issue against the tenant.—Freeman on Judgments, § 171. The principle is, that a party having a distinct possession of the premises, at the commencement of the suit, if that possession is to be disturbed by the judgment and writ of possession, must have an opportunity to defend, or he can not be dispossessed. If he has not such possession—if that resides in the tenants, who are made defendants, and pending the suit he acquires possession, he is a privy bound by the judgment, and subject to be dispossessed by the writ of *habere facias*. The title and the right of possession may reside in him, but he must yield to the judgment, and when the plaintiff is put in possession, resort to his action of ejectment, or other appropriate remedy, to assert and enforce his right. As is said in *Howard v. Kennedy*, *supra*, “if the law were otherwise, it would be in the power of the defendant, by changes of possession, to protract the litigation interminably.” In an action by the landlord, for the recovery of possession, the judgment against the tenant would not be evidence; it would be *res inter alios actæ*, as was heretofore decided in this cause. It is the fact of entry into possession which converts him into a privy, affected and bound by the judgment therein rendered, so far as its execution is concerned.

An attorney, in this State, has a general authority to superintend and direct the execution of process, issuing on judgments he may have obtained for his clients.—*Albertson v. Goldsby*, 28 Ala. 711. He may give all such instructions to the officer having the process for execution, as the client could give, if personally present, and the process will afford him protection, to the same extent it would protect the client. If the appellee had not possession of the premises at the commencement of the suit in ejectment; if the possession of the premises was then in her tenants, who were defendants in the suit, and the possession continued in them until the rendition of the judgment, the appellee subsequently entering into possession, before their term had expired, was subject to be dispossessed by the writ of possession. The appellant Smith, as the attorney of the plaintiff, could properly instruct the marshal, in the execution of the writ, to dispossess her, or any person entering into possession subsequent to the commencement of the suit. The charge of the court is erroneous, if these were the facts, as the bill of exceptions states, there was evidence tending to prove. The charge would, however, be correct, if the facts were that at the com-

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mencement of the ejectment suit the appellee had possession of the premises. Then the judgment in the ejectment suit would not affect her—the writ of possession would not be an authority for the disturbance of her possession: and the marshal ejecting her, the plaintiff, his agent, or attorney, commanding, encouraging, or assisting in its execution, would be trespassers. The effect of the charge given, is to exclude from the consideration of the jury, the evidence which tended to show, that at the commencement of the suit in ejectment, the possession was in the tenants, the defendants to that suit, and not in the appellee. The evidence which tended to establish this phase of the case, should have been submitted to the jury; as well as that which was in conflict with it, and the jury should have been instructed as to the law applicable to each state of facts.

The general principle is well settled, that if several participate in the commission of a trespass, the injured party may sue them jointly or severally, but it has never been supposed he could have several satisfactions. If he sues the trespassers jointly, there can not be an apportionment of damages among them, as the jury may suppose the one or the other to have been the more guilty in inflicting the wrong. There must in such case, be a joint, not a separate assessment of damages.—*Callisor v. Lemons*, 2 Port. 145. If the jury should assess the damages severally, it would not be an irregularity which would avoid the verdict necessarily; it would be optional with the plaintiff to have the verdict set aside, and take a *venire de novo*, or he could cure the irregularity by electing to take the damages assessed against either defendant, and entering a *nolle prosequi* as to the others.—*Blann v. Crocheron*, 20 Ala. 320. But if he takes judgment against each one, for the damages assessed against him, it will be reversed on error.—*Layman v. Hendrix*, 1 Ala. 212. Whether several, or only one participate in the trespass, the *injury is single*, and it is compensation for the injury the law contemplates. Hence, it is a general principle, that a release to one joint trespasser, or an acceptance of satisfaction from one, discharges all.—1 *Waterman on Trespass*, 73, § 68; 2 *Greenl. Ev.* § 30; *Stone v. Dickinson*, 5 Allen, 29. The statute in express terms declares, that “all receipts, releases and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties to the same.”—Rev. Code, § 2685. The purpose of this statute, is to relieve these instruments from the artificial effect sometimes imparted to them at common law, defeating the expressed intention of the parties, or the purpose it was obvious they designed. If the purpose is

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to discharge a debt due by record, or by a specialty, and that purpose is expressed in writing, it is not now material whether the writing is under seal or not; nor is it material though a smaller sum is accepted, than is really due. If the purpose is to release a part only of a demand, and not the whole, or one only of several jointly liable, it is a release only *pro tanto*. No other or greater effect can be given it, than the parties intended. A release to one of several joint contractors, though the creditor should retain the right to proceed against the others, would release them, to the extent that they could demand contribution from their associate who is released. It would have no other operation. The release of Harper, and the acceptance from him of three thousand dollars, on account of the use and occupation of the premises during the period she was deprived of the possession by the trespass complained of, satisfies the plaintiff's right of recovery, in this action, to that extent only. A satisfaction to that extent, it is apparent the parties contemplated, and so it must operate, or the plaintiff would obtain a double satisfaction. If any larger operation was given it, the intention of the parties would be defeated. Harper stipulated for his own release, not for the release of the defendants to this suit. It was partial, not entire satisfaction, he proposed to make, and the plaintiff agreed to accept. The present defendants are benefited, not wronged. Contribution from Harper they could not have compelled, and their liability is lessened by the payment he has made, and the plaintiff has accepted. If the release had been intended to cover the entire cause of action embraced in the complaint—if it had been intended to accept the sum paid, in full satisfaction, such would be its operation, and all who participated in the trespass would be discharged. But it was partial compensation, for the loss of the use and occupation, and the discharge of Harper only, that was intended, and beyond that it is not available to the present defendants—*Snow v. Chandler*, 10 N. H. 62; *Chamberlain v. Murphy*, 41 Vermont, 110.

The judgment must be reversed and the cause remanded.

[Sternau et al. v. Marx.]

Sternau et al. v. Marx.*Action for Slander.*

1. *Judgment on demurrer; when not revisable on appeal.*—A judgment on demurrer can not be revised on appeal if it is shown only by the bill of exceptions.

2. *Action for slander; what may be shown in defense.*—In an action for slander, in falsely and maliciously charging one with having committed a crime, the defendant may show the circumstances, in reference to which the words were spoken, to negative the intention to impute crime, which the words themselves may import.

3. *Same; what material; words construed by court and jury.*—It is not the meaning of the person using the words, but the sense in which the words are understood by the parties to whom spoken—taking them in their ordinary signification—that is material; and it is for the court and jury to construe the words; and—the words being unambiguous—a witness can not be allowed to state what meaning the defendant intended to convey by them.

4. *Intention of party; how arrived at, if material.*—When the intention of a party is material, it must be collected from the act done, in connection with the surrounding circumstances, and accompanying declarations. It is an inference drawn by the jury and not a fact to which a witness may testify.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAS. E. COBB.

Action was brought by Simon Marx, appellee, against Henry Sternau and his wife, Sarah Sternau, for \$10,000, for—as alleged—“falsely and maliciously charging the plaintiff with the crime of embezzlement, by speaking of and concerning him in the presence of divers persons, under the following circumstances: The plaintiff, who was a clerk in the store of the defendant, Henry Sternau, had sold a pair of shoes from said store to one Simon Oppenheimer; the defendant, Sarah Sternau, afterwards saw the said shoes on the feet of the wife of the said Simon Oppenheimer, and said to her that if she (the said defendant) had not seen them, the said defendant would never have received a cent for them, meaning that the plaintiff had embezzled the said shoes from the said store of Henry Sternau, and that the latter would never have known of it, but for the accident which enabled the said Sarah Sternau to discover them on the feet of the said wife of Simon Oppenheimer.”

The bill of exceptions recites that the defendant demurred to the complaint—stating the grounds—and the demurrer was overruled. The demurrer and ruling thereon does not elsewhere appear in the record.

The defendants offered and read in evidence the deposition.

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tions of Mrs. Sternau; after which the court, upon motion of the plaintiff—the defendant excepting—ordered to be stricken out, and excluded from the jury, the portion of said deposition, which contains her answer, as follows: [After referring to the fact of having told Mrs. Oppenheimer that if she (defendant) had not seen the shoes on her (Mrs. O's) feet, she swore "we (she and her husband) would not have been paid for them,] meaning, thereby, that as they had not been charged, and she being under the impression that the shoes came from her husband's store, and as already some five days had elapsed since the purchase of the shoes, and neither Marx nor Mr. Oppenheimer had said a word about them, and as Marx was going to leave in a few days and had seemingly forgotten the sale of the shoes, or thought them paid for by Mr. Oppenheimer, and there was not much chance of his ever making a charge for them, as the matter might be entirely forgotten."

Appellants now assign as error: 1. Overruling the demurrer; 2. Striking out the testimony aforesaid of Mrs. Sternau.

S. B. PAINE, for appellants.—1. The court below erred in overruling the demurrer to the first count in the complaint. The words used are as follows: "The plaintiff, who was a clerk in the store of the defendant, Henry Sternau, had sold a pair of shoes from said store to one Simon Oppenheimer; the defendant, Sarah Sternau, afterwards saw the said shoes on the feet of the wife of the said Simon Oppenheimer, and said to her, that if she (the said defendant) had not have seen them, the said defendants would never have received a cent for them"—meaning, &c. The words charged to have been used by one of the defendants may have referred to the unwillingness or inability of Oppenheimer to pay for the shoes, or to the failure or neglect of Marx, the appellee, to charge them—they do not imply or convey the idea of an indictable offense—and are not in themselves slanderous. The office of an innuendo is to affirm the words spoken or published, and it can not enlarge their meaning.—*Henderson v. Hale*, 19 Ala. 154; *Robinson v. Drummond*, 24 Ala. 174; *Kirksey v. Fike*, 29 Ala. 206.

2. The court erred in excluding from the jury that portion of the evidence of one of the plaintiffs, as shown by the bill of exceptions. The evidence excluded went directly to show the facts and circumstances in reference to which the words were spoken, and that she did not thereby intend to impute the crime to plaintiff (in the court below), which, standing alone, they might naturally import.—*Williamson v.*

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Cawley, 18 Ala. 206. If the testimony excluded from the jury showed, or had a tendency to show, that the words used were spoken in reference to a transaction which could not amount to the imputation of a crime, defendants had a right to such proof, and it would have protected them from all legal consequences, except those resulting from special damage.—*Wright v. Lindsay*, 20 Ala. 428.

ABERCROMBIE & GRAHAM, *contra*.—1. Judgments upon demurrers, not shown otherwise than by recitals in the bill of exceptions, can not be revised on appeal.—*Pound et al. v. Hamner*, Head Notes Supreme Court, December term, 1876. See, also, *Covington County v. Kenney*, 45 Ala. 176; *Ware, Adm'r, v. St. Louis Bagging & Rope Co.* 47 Ala. 667.

2. There was no error in suppressing that portion of the deposition of Mrs. Sternau which stated what she meant in uttering the words charged to be slanderous. The meaning of the witness, in such utterance, was the very issue for the jury to try.—2 Greenleaf Ev. § 417.

BRICKELL, C. J.—1. Repeated decisions have settled that a judgment on demurrer is not open to revision if it is shown only by the bill of exceptions.

2. It was competent for the defendants to have shown the facts and circumstances, in reference to which the words were spoken, for these often negative the intention to impute crime, which the words themselves may import.—*Williams v. Cawley*, 18 Ala. 206.

3. The evidence offered extended beyond this—to proof by the wife of what she meant by the words. It was not her meaning, but the sense in which the words were understood by the persons to whom they were spoken, taking them in their ordinary signification, that is material. If to them, the words so taken and construed, in reference to the facts and circumstances under which they were spoken, import an accusation of crime, their injurious and actionable quality is not lessened because she did not intend they should be so taken and accepted. It was for the court and jury to construe the words, and no witness could be allowed, the words being unambiguous, to state what meaning the defendant intended to convey by them.—*Townsend on Libel & Slander*, § 384.

4. When the intention of a party is material, it must be collected from the act done, in connection with the surrounding circumstances, and accompanying declarations. It is an inference drawn by the jury, and not a fact to which a witness may testify.—*Whetstone v. Br. Bank of Montgomery*,

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or a misdemeanor was a misdemeanor at common law, and punishable by fine, imprisonment in county jail, or hard labor for the county.—See Revised Code, 3754, in connection with 4199, and the authorities above cited.

GAMBLE & BOLLING, and J. W. POSEY, *contra*.—The attempt of the plaintiff is to allege oral slander, and in order to render the words actionable, he must charge the commission of an offense indictable by law, and drawing after it an infamous punishment, or involving moral turpitude.—See *Smith v. Gafford*, 31 Ala. 45; *Cobson v. Horwood*, Minn. 94; *Perdue v. Burnett*, Minn. 138; *Thirmen v. Matthews*, 1 Stew. 384; *Hillhouse v. Peck*, 2 Stew. & Port. 395. It is not sufficient that the words are armed or charged in general terms; they must contain “an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor;”—unless this is done, the averment is insufficient. See *Hillhouse v. Peck*, *supra*. Do the words set out in the complaint contain an express imputation of some capital offense, or some other infamous crime or misdemeanor? We insist they do not. Infamous crimes or misdemeanors, are those offenses, and those only, belonging to the “*crimen falsi*”—such as forgery, perjury, and the like; such as incapacitates the party from becoming a witness; or such offenses as are punished capitally or by imprisonment in a State prison, and no other.—See *Rosc. Cr. Ev.* (135); *Burrell's Law Dictionary*, 2 vol. 72.

STONE, J.—The attempt to commit a felony or misdemeanors is a misdemeanor.—Code of Ala. § 4447, and authorities cited on appellant's brief. The word ‘try,’ as found in the connection charged in each count of the complaint, is the synonym of the word attempt.—*Webster's Dictionary*. “Every accusation, importing the commission of a crime punishable by indictment, must be held presumptively to mean what the language used ordinarily imports.”—Code of 1876, § 2975. To affirm of another that he *tried* to do anything implying physical effort, is the equivalent of saying he attempted to do it. This is the ordinary import of the language.

An attempt to commit a larceny, grand or petit, involves moral turpitude; is indictable and punishable by fine and imprisonment, or hard labor for the county.—Code of Alabama, §§ 4447, 4904. A charge of such offense is actionable *per se*.—2 Brick. Dig. 202, § 5.

Reversed and remanded.

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Heflin v. Rock Mills Manufacturing and Lumber Company.

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Proceeding by Petition for Supersedeas and Rehearing.

1. *Motion to dismiss for want of security for costs ; waiver.*—If the defendant appears and pleads, or otherwise enters into defense, without moving to dismiss for want of security for costs, he thereby waives the objection, and admits himself rightly in court.

2. *Same ; when such motion properly overruled.*—Where the defendant appeared before the circuit judge, in a suit by petition for rehearing, and moved to dismiss the petition and filed demurrers—pertaining solely to the sufficiency of the petition—and his motions and demurrers being overruled, applied to the Supreme Court for *mandamus* to compel the circuit judge to dismiss petition on the grounds contained in said motions and demurrers, and, after the Supreme court denied the *mandamus*, he made a motion in the Circuit Court to dismiss for want of security for costs—*held*, that such last motion being made at such time, was properly overruled. (*Case of Davis Avenue Railroad Co. v. Mallon*, 57 Ala. 168, held to be unlike the present case in principle.)

3. *Interlocutory ruling ; no appeal from ; mandamus proper remedy.*—There being no final judgment, an appeal does not lie from the interlocutory ruling in a suit by petition for rehearing under section 3161 of the Code of 1876, nor will such appeal be aided by the final judgment in the original cause; *mandamus* is the proper remedy if the ruling was incorrect.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

Action was commenced by John T. Heflin, appellant, against the Rock Mills Manufacturing and Lumber Company, appellees, for seven hundred and fifty dollars, alleged to be due the appellant for work and labor done and performed by him for the appellees. The defendants (appellees) not appearing or making defense to the complaint, judgment was rendered in plaintiff's (appellant's) favor for the amount claimed.

The defendants (appellees) then filed a petition for a rehearing and supersedeas, under section 3161 of the Code of 1876. Whereupon the said John T. Heflin—the defendant to the petition—made several motions to dismiss the petition and filed demurrers, which motions and demurrers went merely to the sufficiency of the petition. The court overruled the same, and application was made to this (Supreme) Court for a *mandamus* to compel the circuit judge to dismiss the petition on the grounds urged in said motions and demurrers. *Mandamus* was denied by this court. After this, the said defendant, Heflin, moved to dismiss this suit of pe-

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tioner because the plaintiff (petitioner) had not given security for costs; which motion the court overruled, and the defendant reserved an exception.

The plaintiff to the original suit—the defendant to the suit by petition for supersedeas and rehearing—now appeals from the interlocutory ruling of the court below, and makes the following among other assignments of error:

1. Overruling the motion to dismiss the petition.
3. Overruling the motion to dismiss for the want of security for costs.
4. Overruling the demurrers.

JOHN T. HEFLIN, *pro se.*—1. The proceeding for rehearing is a suit, and surety for cost should have been given.—*Ala. & Tenn. R. R. Co. v. Harris*, 25 Ala. 232; *Ex parte Cole*, 28 Ala. 50; *Ex parte Robins*, 29 Ala. 71; *Ex parte Morgan*, 30 Ala. 51.

2. (From the view taken of the case by the Supreme Court, it becomes unimportant to set out the other points and arguments made by the brief on the other assignments of error.)

SMITH & SMITH, *contra.* (No brief came to Reporter.)

STONE, J.—1. It is very questionable if we did not, at an early day, go too far in dismissing suits, for a failure to give security for costs.—See *Ex parte Cole*, 28 Ala. 50; *Ex parte Robins*, 29 Ala. 71; *Ex parte Morgan*, 30 Ala. 51. We then determined to carry the principle no farther, and hence we held, if defendants appeared and pleaded, or otherwise entered into defense, without moving to dismiss for want of security for costs, this was a waiver of the objection, and an admission that the defendant was rightly in court.—*Weeks v. Napier*, 33 Ala. 568; *Duncan v. Richardson*, 34 Ala. 117; *Thompson v. Clopton*, 31 Ala.

2. The present case comes precisely within this rule. The defendant to the petition appeared before the circuit judge, and moved to dismiss the petition on several grounds, none of which raised the question of a want of security for costs. His motion was overruled, and he thereupon asked leave to demur to the petition on the same grounds. These all went to the sufficiency of the petition. Failing in both these motions, he applied to this court for a *mandamus* to compel the Circuit Court to dismiss the petition, on the said grounds he had urged before the circuit judge. We denied the motion. After this, the motion was made in the Circuit Court to dismiss for want of security for costs. The motion was rightly

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overruled. The case of *Davis Avenue Railroad Company v. Mallon*, was unlike this in principle.—57 Ala. 168. We adhere to our former ruling.—*Ex parte Heflin*, 54 Ala. 95.

3. The present suit was commenced by petition for rehearing under section 3161 of the Code of 1876. There is no final judgment in that suit. The final judgment in the original cause, to obtain a rehearing of which the present proceedings were instituted, does not aid this appeal, which is taken from an interlocutory ruling in the last suit. An appeal from such ruling does not lie to this court. *Mandamus* is the remedy, if the ruling was incorrect.—*Ex parte Cole*, *Ex parte Morgan*, *Ex parte Robbins*, *supra*; *Steamboat Empire v. Ala. Coal Mining Co.* 29 Ala. 698; *Davis v. You*, 43 Ala. 691.

Appeal dismissed.

Mitchell v. Davis.

Action against Probate Judge to recover the Statutory Penalty for issuing Marriage License to Minor without the consent of Parent or Guardian.

1. *Amendment of complaint; what allowable.*—In a suit against a probate judge to recover the statutory penalty for issuing a marriage license illegally, the complaint may be amended, under sections 3155-6-7 of the Code of 1876, by an alteration of the mere descriptive names of the persons to whom the license was issued; such alteration does not constitute a change of the parties, nor a change of the form of action.

2. *Complaint; sufficiency of.*—Where the marriage license mistook the names of the parties it authorized to marry, the man's name being written therein J. L. Arnold, instead of D. L. Arnold; and the female's name being written Ellen, instead of Nancy Ellen, and the license being issued to these identical parties, a complaint, charging that the license was issued for the marriage of D. L. Arnold, by the name of J. L. Arnold, and Nancy Ellen Mitchell, by the name of Ellen Mitchell, averring the identity of the parties, is sufficient.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JOHN HENDERSON.

The original complaint filed in this cause, reads as follows:

"*James C. Mitchell v. D. L. Davis, Judge of Probate:* The plaintiff, who sues as well for the State as for himself, claims of the defendant, judge of probate of Randolph county, Alabama, five hundred dollars, for issuing to John A. Arnold a marriage license to marry one Nancy E. Mitchell, who was under 18 years of age, at the time of issuing such license,

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without the consent of the parents or guardian of said Nancy E. Mitchell, the said Nancy not having had a former husband."

The complaint was afterwards amended, by adding a count, so as to read "the plaintiff claims, &c. (as in the original), for issuing to Isaac A. Arnold, alias Alonza Arnold, marriage license to marry one Nancy E. Mitchell, who was under 18," &c. (as in the original).

The defendant moved to strike the amended complaint, or second count, from the file, on the ground that it was "a radical departure from the original complaint;" which motion was granted by the court, whereupon the plaintiff asked leave to file the following additional count: "The plaintiff, who sues as well for the State of Alabama as for himself, claims of the said defendant, &c., . . . five hundred dollars, for issuing to D. L. Arnold a marriage license to marry Ellen Mitchell, who was then under the age of eighteen years, and a daughter of plaintiff, to-wit: on the — day of Feb., 1875, without the consent of the parents or guardian of said Ellen. Plaintiff avers that the John A. Arnold is one and the same identical person mentioned in the first count of plaintiff's complaint, and that he is as well known by the name of Lonzo or Alonzo, as he is by the name of D. L. Arnold. And plaintiff further avers, that said Nancy E. Mitchell mentioned in said first count, and Ellen Mitchell, mentioned in said license, is identically one and the same person to whom said defendant issued and delivered said license to marry."

The plaintiff then proved the identity of said persons as alleged, and introduced the license in evidence. On motion of defendant, however, said license and evidence were excluded from the jury, and exceptions reserved by plaintiff.

The defendant then moved to take a non-suit, with leave to set aside the same in the Supreme Court; which was granted.

The several rulings of the court, adverse to plaintiff, as above noted, are now assigned as error.

CICERO D. HUDSON, for appellant.—1. The court should have permitted the amendment offered.

2. It was the negligence of defendant that the names of the parties were not correctly set out, of which he should not be allowed to avail himself.

3. The amendment should have been allowed to be filed, and, if not sufficient, to have been amended.

4. The names of Arnold and Mitchell are in the license, &c., which it is insisted were sufficient to *amend* by.

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5. If the ruling of the judge is right, we here have a wrong without a remedy.

6. The given name of the parties in the marriage license, &c., could be amended, and by proper averments, &c., show the parties for whom the license was intended, &c.—See 33 Ala. 110, 114, 115.

HUDSON & TEAGUE, *contra*. (No brief came to Reporter.)

STONE, J.—1. The amended complaint, offered in this case, was neither a change of a sole party plaintiff or defendant, a change of the form of action, nor an entire change of the cause of action. It was only a change of the descriptive names of the persons to whom the marriage license was issued—one of the material averments in the complaint. This, we think, was allowable, under our liberal statutes of amendments.—Code of 1876, §§ 3155–6–7; 1 Brick. Dig. 73, 75; *Roddy Thomas v. The State*, at present term.

2. The license issued in this case mistook, to some extent, each of the names of the parties it authorized to marry. In the man's name, the initial letter D. was, by mistake, written J. The female's name was written Ellen, the name by which she was known, instead of Nancy Ellen, her full name. Still, the license was issued to these identical persons. We do not doubt that a complaint, charging the license was issued for the marriage of D. L. Arnold, by the name of J. L. Arnold, and Nancy Ellen Mitchell, by the name of Ellen Mitchell, averring the identity of the persons is sufficient. The second amended complaint is substantially what we have stated above, and is sufficient.

The judgment of the Circuit Court is reversed, the non-suit set aside, and the cause remanded.

[Robinson v. Bullock.]

Robinson v. Bullock.

Action for breach of Contract.

1. *Contracts; when void for uncertainty.*—Agreements, verbal or written, which are so vague and indefinite in their terms, that the intention of the parties cannot be fairly and reasonably collected from them, are void, and courts will not undertake to give them effect.

2. *Same; how construed.*—Every contract is entitled to the reasonable construction of which it is susceptible, and which will render it operative rather than unavailing; the law leans against the destruction of contracts because of uncertainty. Hence, if a contract is silent as to the time of performance, the law presumes that performance must be had in a reasonable time; and whatever consequence and incident is, in common sense, appurtenant to its terms, the parties must have understood and intended, should be attached.

3. *Same; presumption; when complaint not demurrable; question for the jury.*—Where two parties entered into a contract, the one agreeing to erect and keep in operation a steam saw mill, for the time expressed, and the other to supply it with logs to keep it in operation—though the capacity of the mill is not expressed—it is to be presumed that they intended that the mill should be of a capacity reasonably adapted to carry into effect the object they had in view; and whether the mill is of such capacity is a matter of fact for the jury; a complaint, therefore, averring the erection of a mill of particular capacity, is not demurrable for uncertainty, for if it was not reasonably adapted to carry into effect the objects of the parties, that can be shown in defense.

4. *Same; when complaint not demurrable, though contract, as alleged, appears uncertain, &c.*—Though the contract appear uncertain and of doubtful construction, yet the complaint was held not demurrable when it averred that a mill of particular capacity was erected at the request of the party demurring—the parties themselves thereby placing a practical interpretation on the contract which can well be adopted as its just construction, conforming to their intentions.

5. *Same; partnership not created by the contract; demurrer not aided thereby.*—Upon principles settled in *Moore v. Smith*, (19 Ala. 774), and approved in *Fail v. McRee*, (36 Ala. 61), it is held that the contract in this case does not create a partnership; nor would the demurrer be aided if such relationship were created between the parties.

6. *Same; when remedy at law exclusive.*—While it is a general rule that an action *ex contractu*, at law, is not maintainable between partners or partnership transactions, yet they may sue each other for the breach of distinct, positive stipulations binding on one only, contained in the partnership agreement. In such cases, the necessity of an account of the partnership transactions, not being involved, the remedy at law is generally exclusive.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JOHN HENDERSON.

The appellant, John L. Robinson, brought suit against appellee, D. A. Bullock, upon the following complaint: "The plaintiff claims of the defendant eighty thousand dollars for the breach of an agreement entered into by her on the 13th of November, 1865, in substance as follows, to-wit: 'The State of Alabama, Macon county. This memorandum of

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agreement made and entered into this, the thirteenth day of November, A. D., 1865, between John L. Robinson, of the first part, and Mrs. D. A. Bullock, of the other part, both of said county and State, witnesseth, that for and in consideration of the fact that said John L. Robinson shall erect and put in order a steam saw mill, at or near Cross Keys, in said county, the said Mrs. Bullock agrees to furnish saw-logs to said mill for five years next ensuing the date of this instrument, said logs to be furnished daily to said mill or in such way as to keep the mill constantly running. Said Mrs. Bullock agrees, also, to furnish wood for running said mill; said Robinson also covenanting and agreeing to superintend said mill and the cutting and hauling stocks necessary for the supply of said mill. It is also understood and agreed between the parties that the lumber be equally divided between them at the mill, or the proceeds thereof be equally divided between them after sale of the lumber. In witness whereof, the said John L. Robinson and Mrs. D. A. Bullock have hereunto set their hands and seals. (Signed), J. L. Robinson, D. A. Bullock. *Attest*: W. B. Boyd, A. B. Fannin. (The saw mill is to be located upon the said D. A. Bullock's land, near Cross Keys, Macon county. *Attest*: W. B. Boyd and A. B. Fannin). Yet, although the plaintiff has complied, on his part, with all the provisions, according to the stipulations of said agreement, and did erect and put in running order, a steam saw mill upon the lands of said defendant, near Cross Keys, in Macon county, Alabama, to-wit: with capacity to cut from eight to twelve thousand feet of lumber per day, and did erect houses and improvements, preparatory to the running of said mill and converting the saw-logs into lumber, in the county aforesaid, on the 1st day of June, 1868, at very great expense, to-wit: \$20,000, and did, in all things, comply with his part of the said agreement, yet the defendant has failed to comply with the following provisions thereof, to-wit: 'The said Mrs. D. A. Bullock agrees to furnish saw-logs to said mill for five years, next ensuing the date of this instrument, said logs to be furnished daily to said mill, or in such way as shall keep said mill constantly running. Said Mrs. Bullock agrees, also, to furnish wood for running said mill.' The said defendant has failed to furnish saw-logs to said mill daily, for five years from the date of said instrument. Said defendant has failed to furnish saw-logs to said mill in such way as shall keep said mill constantly running. Said defendant, although often requested so to do, has failed to furnish saw-logs to said mill and wood for running the same, as by said agreement, to the damage of plaintiff, \$80,000, for which he brings this suit." The com-

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plaint contains a second count, averring in substance the same as above set out.

To said complaint the defendant demurred: 1st, because the contract, as alleged, is so indefinite and uncertain as to be wholly void; 2d, because no sufficient breach is assigned; 3d, because said contract constitutes a partnership between plaintiff and defendant, and no action at law can be maintained therefor.

The court sustained the demurrers on all of the grounds, save that of partnership, and the plaintiff filed an amended complaint, containing several counts, all of which aver substantially what is averred in the first complaint, with the additional averment that the said steam saw mill was, by agreement and understanding of the parties at the time, to be of a capacity to saw from 8,000 to 12,000 feet of lumber per day, and that plaintiff did erect a mill of such capacity, which was of the usual capacity and such as was agreed on and contemplated; and that he did erect a steam saw mill of such capacity as was approved by said defendant, and was erected under the advice, consent and direction of defendant, and was approved by her after its erection; and no objection was made by her to said mill.

The defendant demurred to the amended complaint on the same grounds as to the original, and the court sustained the same on all of the grounds, save that of partnership.

The rulings of the court below upon the demurrers, is now assigned as error.

G. W. GUNN, W. C. McIVER, and W. H. BARNES, for appellant.

DAVID CLOPTON, and F. S. FERGUSON, *contra*.

BRICKELL, C. J.—1. The principal ground on which the appellee relies to support the judgment of the Circuit Court, sustaining the demurrers to the complaint, is, that the contract set out in each count, is void for uncertainty. The uncertainty is supposed to lie in the failure to specify the capacity of the mill the appellant was bound to erect, or to state any fact or to introduce any provision from which the capacity could be inferred. Uncertain in this respect, as the quantity of logs the appellee was bound to furnish was dependent on the capacity of the mill, the duty resting on her is uncertain, and incapable of ascertainment. Agreements, verbal or written, so vague and indefinite in their terms that the intention of the parties cannot be fairly and reasonably collected from them, are void, and courts will not

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undertake to give them effect, lest, instead of enforcing a contract the parties have made, they should make for them a contract into which they did not intend entering.—1 Chit. Con. 92. Of such contracts there are examples to be found in our decisions. In *Watson v. Byers*, 6 Ala. 393, on the presentation of an account, the defendant admitted that it was in part correct, without stating any particular part. The admission was unavailing to the plaintiff, because of its uncertainty. From it no just conclusion could be attained. In *Erwin v. Erwin*, 25 Ala. 236, the promise averred was that the defendant would assist the plaintiffs by advancing to, and indorsing for them, to enable them to carry on their mercantile business advantageously. The court said, "Conceding this to be a contract, it is so indefinite and uncertain as to be wholly void. The defendant was to indorse the plaintiff's paper, and to make advancements. When and for how much was he to indorse, and how often? How long should the obligation to indorse rest upon him? How much money was he to advance, and when, and on what securities, were the advances to be made? The contract is silent as to all these matters. If it be answered, that he was to advance enough to enable them to carry on their mercantile business, this does not aid the matter; for the question recurs, upon what scale is it to be carried on? The capital must bear some just proportion to the nature and size of the business to be carried on, and this is left wholly unsettled. It is clear, then, that no breach could be assigned upon it, which could be compensated by any criterion of damages to be furnished by the contract itself, and it is void for uncertainty." The promise averred in *Adams v. Adams*, 20 Ala. 272, was by a father to give his daughter "a full share of his property, which then and there was worth \$25,000," and it was held void for uncertainty. But it was said if the promise was founded on a sufficient consideration, and was to make the daughter equal in property to his other children, it was good.

2. In these cases, from the words of the contract, it was impossible to collect a well defined intention the parties entertained and were bound to execute; nor were there consequences and incidents appurtenant to the words, which the parties must have understood and intended should have been attached. Every contract is entitled to a reasonable construction when it is fairly susceptible of it, and a construction which will render it operative, rather than one which will render it unavailing. The law does not favor, but leans against the destruction of contracts because of uncertainty.—1 Chit. Con. 159. Therefore, if a contract is silent

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as to the time of performance, the law presumes that performance must be had in a reasonable time. So, if there is a contract for the sale of goods, and no time is provided for delivery, the law adds that delivery must be made within a reasonable time. Whatever consequence and incident is, in common sense, appurtenant to its terms, the parties must have understood and intended should be attached.

3. The parties to the present contract intended that the one should erect and keep in operation a steam saw mill for the time expressed, and the other should supply it with logs to keep it in operation. The capacity of the mill is not expressed, but is it not imputing to them either folly or fraud, not to presume that they intended it to be of capacity reasonably adapted to the carrying into effect the object they had in view? This is a consequence of, and an incident appurtenant to the terms of the contract which they must have understood and intended should be attached. Whether the mill was of that capacity is matter of fact to be determined by the jury from a consideration of the usages of the section in which the contract was made and to be performed, and from the relative situation of the parties, and the circumstances surrounding them when the contract was entered into. It seems plain it was contemplated, the logs were to be supplied by the appellee from her own lands, through a period of five years. Whether the mill was of proper capacity to saw these logs within that period, the jury alone can determine when the facts are before them. The appellant could not erect a mill which, if kept as the contract contemplates it should be, in constant operation, of capacity to exhaust this timber in one or two years, involving the appellee in the necessity of obtaining logs elsewhere. Nor could he erect a mill which was of such inferior capacity, that though constantly supplied with logs, would yield inconsiderable profit. A mill of capacity reasonably adapted to carry into effect the objects of the parties is contemplated by the contract. The counts of the original complaint, averring the erection of a mill of particular capacity, were not subject to demurrer for indefiniteness and uncertainty. If it was not reasonably adapted to carry into effect the objects of the parties, that can be shown in defense.

4. But if the contract was indefinite and uncertain, and of doubtful construction, the demurrer should not have been sustained to the counts of the amended complaint, which aver that a mill of particular capacity was erected at the request, or with the approval of the appellee. The parties themselves thereby placed a practical interpretation on the contract, and it can well be adopted as its true and just con-

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struction, conforming to their intentions.—*Chicago v. Sheldon*, 9 Wall. 50. It is not necessary to notice the count which avers a parol agreement as to the capacity of the mill coteremporaneous with the execution of the contract.

5. Upon principles settled in *Moore v. Smith*, 19 Ala. 774, approved in *Faile v. McRee*, 36 Ala. 61, the contract does not create a partnership. Nor would the demurrer be aided if it had created the relation of partners between the parties.

6. While it is a general rule, that an action *ex contractu*, at law, is not maintainable between partners on partnership transactions, yet they may sue each other for the breach of distinct positive stipulations, binding on one only, contained in the partnership agreement. In such cases, the necessity of an account of the partnership transactions not being involved, the remedy at law is generally exclusive.—Gow on Part. 106; *Kinlock v. Hamlin*, 2 Hill, ch. 19; *Terry v. Carter*, 25 Miss. 168; *Bumpass v. Webb*, 1 Stew. 19; *Grigsby v. Nance*, 3 Ala. 347; *Scott v. Campbell*, 30 Ala. 728.

The judgment must be reversed and the cause remanded.

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Motion to Quash Venditioni Exponas.

1. *Administrator de bonis non may move to vacate sale of intestate's land.*—There is such privity between an administrator *de bonis non* and his intestate, as will authorize the former to move a vacation of a sale of the intestate's lands upon irregular process.

2. *Execution lien; against whom and how lost by suspension of execution.*—The lien of an execution may be lost as against junior creditors, mortgagees, or vendees acquiring rights during the time the execution may be stayed by order of the plaintiff; but as against the defendant in execution, his personal representative or heirs, the mere suspension of the execution will not affect the lien.

3. *Venditioni exponas; issuance and nature of; when proper writ; sale under.* Although the statute declares, that a *fiat facias* issued and received by the sheriff during the life of the defendant, may be levied after his death; or if a term has not intervened, that an *alias* may issue and be levied, and does not expressly authorize the issue of a *venditioni exponas*; yet the *venditioni exponas* is in the nature of an *alias* execution as to property upon which a levy has been already made, is within the spirit of the statute, and a proper writ to complete the execution already begun; and if issued in continuation of the lien acquired in the life of the defendant, a sale under it will pass the decedent's title.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. JAMES E. COBB.

It appears from the record that judgment was obtained by

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one E. M. Ervin against the intestate (one L. B. Strange) of A. H. Graham, the appellee, at the Spring term (1868) of said court; that execution was issued upon said judgment and returned to the Fall term; that an execution was issued on the 29th of September, 1874, and placed by the then sheriff in the hands of his successor, and levied on lands sold January 2d, 1875. Notice, in writing, of the levy, was given defendant Strange. There was an endorsement by the sheriff of "stayed by order of plaintiff's attorney." Strange died in February, 1875.

On the 14th of April, 1875, a *fi. fa.* was issued and an endorsement of levy by the sheriff. On the 28th of April, 1875, a "*venditioni exponas*," was issued by the clerk upon which there was an endorsement of "stayed by order of plaintiff's attorney, June 2d, 1875." And on the 2d of November, 1875, a "*venditioni exponas*" was issued, under which the land purchased by appellant was sold, this land being included in the former levies. Proof was made that this writ issued without an order of court authorizing it.

The appellee, as administrator *de bonis non* of said L. B. Strange, made a motion to quash the *venditioni exponas* for the sale of certain lands therein described, and to set aside the sale of said lands under said writ, on the grounds, 1st, because said writ is void; 2d, because said writ is not authorized by law; 3d, because said lands were sold for an inadequate price; 4th, because said lands were sold after the death of said defendant; 5th, because the levy upon said lands, and the sale thereof, were not as the statute provides. The appellee withdrew the third ground of his motion.

The appellant, T. B. Dryer (defendant to the motion below), objected to the allowance of said motion, on the following grounds—1st, because the motion on its face shows that the party who made the same could not, under the law, do so; 2d, because the administrator *de bonis non* could not, as sole party, make said motion." The court overruled these objections, and—after hearing evidence—granted the motion upon all of the grounds, except the third, which was withdrawn.

The rulings of the court in granting the motion and setting aside the sale, are now assigned as error.

S. B. PAINE, and McIVER & BREWER, for appellant.

R. H. ABERCROMBIE, and J. A. BILBRO, *contra*.

BRICKELL, C. J.—1. It is insisted by the appellant, that although the issue of the *venditioni exponas* may have been irregular, and the sale of the lands under it unauthorized,
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the administrator *de bonis non* has not such an interest in the lands, and can sustain no such injury as will entitle him to move a vacation of the sale. It is certainly true, that an application to a court of law for the vacation of a sale, made under its process, will not be entertained at the instance of a mere stranger to the process, and who is without interest in the property sold. But whoever is a party or privy to the process, and has interests which will be injuriously affected if the sale is permitted to stand, may move its vacation.—*Abercrombie v. Conner*, 10 Ala. 293; *Lee v. Davis*, 16 Ala. 516; *Freeman on Executions*, § 305. The statutes entitle an administrator, whether the administrator in chief or an administrator *de bonis non*, to enter on and take possession of the lands of the intestate, intercepting the right of the heir to enter. Whether the estate is solvent or insolvent, he may in his representative capacity maintain an action for the recovery of possession, if it is withheld from him. Power to rent the lands is conferred, and it is his duty, if a sale of them is necessary for the payment of debts or for distribution, to apply for and obtain orders of sale from the court of probate. He is a privy to the process against his intestate, and the right of entry and possession with which he is clothed, would be embarrassed if he was not allowed to maintain a motion to set aside an irregular or illegal sale, under judicial process, as he is to pursue other actions to obtain possession.

2. The record discloses that, prior to the death of the intestate, Strange, there was an execution against him in the hands of the sheriff, a lien, and levied on the lands which was stayed by order of the plaintiff. After his death, without the lapse of a term, an alias execution issued, which was again levied, and after its return a *venditioni exponas* issued commanding the sheriff to sell the lands. It is insisted the lien of the execution, issuing and levied before the death of the intestate, was lost by the order of the plaintiff to stay it. And further, that the statute does not authorize a *venditioni exponas* to issue for the sale of the lands of a deceased person, but requires a lien by execution obtained in his life to be continued in no other mode than by an alias *feri facias*. Liens of executions may be lost as against junior judgment creditors, mortgagees, or vendees acquiring rights during the time the execution may be stayed by order of the plaintiffs. But as against the defendant in execution, or his personal representative or heirs, or others not acquiring rights or liens, the mere suspension of the execution, has no effect on its lien.

3. A *venditioni exponas* in our practice, is a writ of execution, directed to the sheriff commanding him to sell goods or

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chattels, or lands and tenements, on which he has previously levied, and which remains unsold. It is issued by the clerk, as other writs of execution are issued, without any express order from the court. It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of *venditioni exponas*.—*Gary v. Hines*, 8 Ala. 837; *Autry v. Walters*, 46 Ala. 476. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a *venditioni exponas* is the proper writ. The *venditioni exponas* continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal.—Freeman on Executions, § 60. The writ is, indeed, merely for the continuation and completion of the original execution.—*Taylor v. Doe*, 13 How. (U.S.) 293. And if its mandate is for the sale of lands on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of the execution.—*Badham v. Cox*, 11 Ired. 456; *Taylor v. Mumford*, 3 Humph. 66. True, the statute declares a *feri facias* issued and received by the sheriff during the life of a defendant, may be levied after his decease, or if a term does not intervene, an *alias* may be issued and levied, and does not expressly authorize the issue of a *venditioni exponas*. The purpose of the statute is to continue the lien acquired in the life of the defendant, notwithstanding his death, and to authorize such process as is necessary to enforce the lien. A *venditioni exponas* is in its nature and operation, as to the property on which the levy may have been made, an alias execution; it merely commands and authorizes, as to real estate, the completion of the execution already begun. The result is, the Circuit Court was in error in vacating the sale of the lands, and the judgment must be reversed and the cause remanded.

[Flewellen et al. v. Crane.]

Flewellen et al. v. Crane.

Bill in Equity to Vacate a Fraudulent Conveyance.

1. *Fraudulent conveyance; right to proceed at law; when will not interfere with right to proceed in equity.*—Because a judgment creditor, may at law, proceed to sell under execution, lands which his debtor has fraudulently aliened, and the purchaser may, in ejectment, recover them of the fraudulent donee, the existence of such rights does not interfere with the right to resort to equity for the vacation of a fraudulent conveyance as an obstacle in the way of the full enforcement of the judgment, and a cloud on the title to the property.

2. *Fraud; allegations of; demurrer.*—Fraud is a conclusion of law from facts stated and proved. When it is pleaded at law, or in equity, the facts out of which it is supposed to arise must be stated, a mere general averment is insufficient upon which to pronounce judgment. A demurrer to such pleading is not a confession of the fraud; for a demurrer confesses only the matters of fact which are well pleaded, and not conclusions or inferences of law or fact.

3. *Preference for particular creditor by insolvent debtor.*—The bill presents a case of preference for a particular creditor by an insolvent debtor, the effect of which is to disappoint all other creditors. It was competent for the debtor to confer, and for the creditor to accept such preference.

4. *Reversal though no objection made below.*—This court has repeatedly held that a decree founded on a bill which does not aver facts, authorizing the court to grant relief, will be reversed on error, though no objection may have been interposed in the primary court.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. N. S. GRAHAM.

The bill in this cause was filed by Angeline Crane, appellee, a married woman suing by her next friend. The bill charges that on the 12th of January, 1875, said Crane obtained judgment against Enos R. Flewellen, one of the appellees, on a promissory note due Jan. 1st, 1871, upon which execution duly issued and was executed by levying upon certain land of said Flewellen, which lands were offered for sale but were not sold, there being no bidders. After said suit was commenced, the said Flewellen conveyed by deed to his wife, the said land. That at the time of said conveyance, the said Flewellen was insolvent and had no other property besides the said land subject to the payment of his debts, and such deed was, in effect, a general assignment; and said Flewellen here had no property other than said land upon which execution could be levied. That said deed was fraudulent and void as against pre-existing creditors, and that said deed was made with intent to hinder, delay, or defraud his creditors, and that said deed is a cloud upon the title of said land, and so operated on the day the sheriff

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offered the same for sale; that said judgment is entirely unsatisfied. The bill concludes with a prayer that on the final hearing the Chancellor will decree that such deed was fraudulent and void as to the debt of complainant, and set aside and annul the same; and for general relief.

Defendant demurred to the bill, 1st, because the complainant has an adequate remedy at law; 2d, because the bill shows upon its face that the lands described therein are subject to levy and sale under the execution, and the complainant could become the purchaser, and as such purchaser could maintain action of ejectment for said land against defendant; that the deed is void for fraud and can create no cloud upon the title which this court can be called upon to remove; that said deed being void for fraud can be attacked at law for that reason, when offered in evidence to defeat an action of ejectment by the purchaser of said lands at sheriff's sale under complainant's execution; 3d, because there is no equity in the bill, being no cloud on the title; there being an adequate remedy at law, and the Chancery Court having no jurisdiction to grant relief upon the allegations of the bill.

The demurrer was overruled, and such overruling is now, among other things, assigned as error.

SHORTER & MCKLEROY, and THOS. H. WATTS, for appellants.

G. L. COMER, *contra*.

No briefs came to Reporter.

BRICKELL, C. J.—1. A judgment creditor may, at law, proceed to the sale under execution of lands which his debtor has fraudulently aliened; and the purchaser may, in ejectment, recover them of the fraudulent donee.—*Carter v. Castleberry*, 5 Ala. 277. But the existence of this right does not interfere with the right to resort to a court of equity for the vacation of the fraudulent conveyance, as an obstacle in the way of the full enforcement of the judgment, and a cloud on the title to the property.—*P. & M. Bank v. Walker*, 7 Ala. 926; *Dargan v. Waring*, 11 Ala. 988. The grounds of demurrer assigned were, consequently, not well taken, if the bill discloses a case for equitable relief.

2. The conveyance sought to be vacated is exhibited with the bill, and on its face recites that it is made in payment of twenty thousand dollars, due from the grantor to the grantee. The averments of the bill are, that the grantor was insolvent at the time of its execution; and that it conveyed all his

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property which was subject to levy and sale; and that it is "fraudulent and void as against pre-existing creditors," and was "made with intent to hinder, delay, or defraud said creditors." It is now insisted that these averments are insufficient to support the decree vacating the deed—that there is no averment impeaching the *bona fides* or sufficiency of the consideration expressed in it; no averment that the debt was not real, and the conveyance accepted in payment of it; no averment that there was any secret trust for the grantor, and no averment of any fact which authorizes the mere conclusion, stated in the bill, that the conveyance is fraudulent. Fraud is a conclusion of law from facts stated and proved. When it is pleaded, at law, or in equity, the facts out of which it is supposed to arise must be stated: a mere general averment, without such facts, is not sufficient. The court cannot, on such averment, pronounce judgment.—*Kinder v. Macey*, 7 Cal. 206; *Catchings v. Manlove*, 39 Miss. 667; *Clay v. Dennis*, 3 Ala. 375; *Bryan v. Spruill*, 4 Jones, Eq. 27; Story's Eq. Pl. § 251 a. A demurrer to such pleading is not a confession of the fraud; for a demurrer confesses only the matters of fact which are well pleaded, and not conclusions or inferences of law or fact.—1 Dan. Ch. Pr. 545.

3. The case presented by the bill, then, is that of a preference of a particular creditor by an insolvent debtor, the effect of which is to disappoint all other creditors. It was competent for the debtor to confer, and for the creditor to accept such preference.

4. It has been repeatedly adjudged in this court, that a decree, founded on a bill which does not aver facts authorizing the court to grant relief, will be reversed on error, though no objection may have been interposed in the Court of Chancery. A complainant must by his bill make out his title to relief. The decree is founded on it; and if, so far from making out a title to relief, the bill discloses that he has no right, the decree cannot be supported.—1 Brickell's Digest, 731, § 1343.

Let the decree be reversed, and the cause remanded.

[Smith et al. v. Murphy et al.]

Smith et al. v. Murphy et al.*Bill in Equity to Redeem Land.*

1. *Heirs necessary parties to bill seeking to divest them of their title.*—When a bill to redeem lands seeks to divest the title out of the heirs of decedent, and vest the same in complainants, it is indispensable—to obtain the relief sought—that such heirs should be made parties defendant.

2. *Deed absolute on its face; vests legal title.*—Where A. executes a deed of lands to B., conveying, on its face, the absolute title in fee simple, the legal title passes to B., and, on his death, descends to his heirs, notwithstanding a separate agreement between A. and B., wherein B. obligated himself to allow A. to redeem within two years, on the payment by him of a debt due B., for which the deed was executed.

3. *One seeking equity must do equity.*—It is an inflexible rule that where a party is forced to seek equity, he must do equity.

APPEAL from the Chancery Court of Tuscaloosa.

Heard before the Hon. N. S. GRAHAM.

The bill, in this case, was filed by William Murphy, and Thomas J. Murphy, and avers (1), that on the 13th of March, 1873, said Thomas J. Murphy was in possession, and was the equitable owner of a certain tract of land (described in the bill), but that the title thereto was in said William Murphy, he being the father of said Thomas J. Murphy; that on said day the said Thomas J. Murphy borrowed from one John C. Tanner the sum of \$400, payable November 1, 1873, and agreed to secure the eventual payment by him on said land; that, accordingly, William Murphy, as the title was in him, executed and delivered to said Tanner his promissory note and a mortgage on said land, payable November 1, 1873,—Eliza Murphy, the wife of said William Murphy, joining in the execution of the mortgage and note. (2). That when the said note and mortgage became due they were unable to pay the same, and under the pressure brought to bear upon them by the said Tanner, they, on the 12th of November, 1873, executed to him a deed, unconditional on its face, in fee simple, to said land, but on the same day, and as a part of the same transaction, the said Tanner executed to William Murphy his certain written agreement; wherein, after reciting the fact of his having had a mortgage on said lands, and the failure to pay as has been hereinbefore set out, binds himself, upon the repayment of said debt, to allow said William Murphy to redeem said land within the time allowed by law. (3). That at the time of said last transaction—the

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12th of November, 1873,—and as part of the same, the said Thomas J. Murphy, the *cestui que trust* of said land, and who had borrowed the money, executed and delivered unto said Tanner a mortgage for the sum of \$95, on one gray mare and a buggy, and three milch cows. (4). That Thomas J. Murphy has paid, on said indebtedness, the following sums of money: In November, 1874, \$30; January, 1875, \$120, and subsequent thereto the further sum of \$30—the first two payments being evidenced by written receipts attached as exhibits. (5). That said Tanner died in 1874, leaving a will appointing A. J. Grimmer, and H. P. Smith, his executors. (6). That said executors contend that said transaction gave their intestate a perfect and indefeasible title to said land without the present right of redemption, and have demanded possession thereof, and also of said mare, buggy and cows; and they assured complainant, Thomas J. Murphy, that they were going to take legal steps thereto; that they have brought an action of detinue against said Thomas J. Murphy, in Tallapoosa county, for said stock, and obtained a writ of seizure therefor, and given a written notice demanding possession of said land; that complainants have asked said executors for permission to sell a portion of said land to raise the balance of said money, but they positively refused, and asserted that even if the balance of the money was offered to them they would not allow complainants to redeem. (7). The bill prays that, upon final hearing, the chancellor may decree that said transactions, together, constitute only a mortgage, and that complainants may be entitled to redeem said land; that the same may be sold for the purpose of paying to the said A. J. Grimmer, and H. P. Smith, the balance due them on said land, and complainants “hereby expressly offer to pay said executors what, in equity and good conscience, they ought to pay;” and for general relief. The bill then prays that subpoenas may be directed to said executors making them parties defendant, but does not seek to make the heirs of said Tanner parties. The bill also prays for an injunction against said executors to restrain them from proceeding at law to sell and dispose of said land and personal property.

The respondents answered the bill, in substance, as follows: 1. They admit that Thomas J. Murphy was in possession of the lands, described in the bill, on the 13th of March, 1873, but deny that he was the equitable owner thereof, and aver that he was only a tenant at sufferance of the said William Murphy, his father. They deny that said Thomas Murphy, on the 13th of March, 1873, borrowed of said Tanner \$400, or any other sum, or secured the payment thereof

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by a lien on said land. They state that on or about the 13th of March, said William Murphy borrowed of said Tanner a sum of money—\$500—and made his note and mortgage on said land to secure the payment thereof—true copies of which are exhibited with complainant's bill. 2. That said deed, executed by William Murphy, and wife to said Tanner, is in fee simple, and without condition, which transaction respondents aver "to have been a fair and *bona fide* sale of said land to said Tanner, by said Murphy." Respondents admit the "obligation made by said Tanner agreeing to allow said Murphy to redeem said land in two years, but they aver that William Murphy wholly failed to redeem the same in accordance with the agreement; that the respondents frequently requested him to do so soon after the two years had expired. 3. Respondents say that they knew nothing of Thomas J. Murphy being the *cestui que trust* of said land, and they most positively deny that he borrowed any money of said Tanner; that he is wholly insolvent, and could not have borrowed said money. They admit that said Thomas J. Murphy did, about the 12th day of November, 1873, make a note to said Tanner for \$195, but they deny that he made any mortgage to Tanner for any amount, or that the making of said note had anything to do, or was in any wise connected with the transaction between William Murphy and Tanner; and respondents aver that said note was given to Tanner for the rent of said lands after Tanner had bought the same from William Murphy, and that in November, 1874, when said note fell due, Thomas J. Murphy made a small payment, and that he was unable to pay the balance of said note, and asked for indulgence, which respondents granted, and took a mortgage to secure the payment thereof, which is attached to the answer as an exhibit. 4. They admit the averments of the fourth paragraph of the bill, but aver that the payments were made with the understanding that the balance of the redemption money should be paid to them, which has not been done. 5. Respondents admit the allegations contained in the fifth paragraph. 6. They admit that they claim the transaction detailed in the sixth paragraph gave to their intestate a perfect and indefeasible title to said land, and that they have demanded possession thereof, also of the property described in the mortgage, and that they are also taking legal steps to obtain the possession thereof, which they aver in right they ought to have, but they most positively deny that they have refused the complainants the privilege of selling off a part of said lands to raise the money to redeem the same; but, on the contrary, they state that money shown to have been made

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by the receipts exhibited, was raised by a sale of a part of said land to one Sharpe, and that the proceeds of said sale is the one that has been paid thereon. They also deny that they have asserted that if the balance of the money was offered them, they would not take it, and the complainants well know that such allegation is untrue.

Having answered the bill, the respondents assigned the following grounds of demurrer: 1st. Want of equity; 2d, misjoinder of parties complainant; 3d, want of proper parties defendant; 4th, multifariousness; 5th, that the allegations are so uncertain that the court could not decree relief to any of the complainants.

On hearing, the chancellor overruled the demurrers, and adjudged that the complainants were entitled to relief, and ordered a reference to the register and that he determine: 1st, how much money was actually borrowed of defendant's testator, in his life-time, on the note and mortgage in the pleadings mentioned, and the time; 2d, what payments, if any, have been made by the complainants, or either of them, the amounts and dates of such payments, and state the account and strike a balance and allow interest to either party. The chancellor further held the deed in question to be a mortgage only, with the right of complainants to redeem by the payment of such balance as the register may report to be due from complainants on account of said borrowed money, if any. He also declared the mortgage, made by Thomas J. Murphy and Martha J. Murphy, to be void, the same being to secure a note, which by the bill (as amended, and the proof) is shown to be usurious.

The register reported, after due notice and testimony: 1st, that complainant received on or about March 13, 1873, from said Tanner, deceased, the sum of \$400; 2d, that T. J. Murphy paid to defendant, Smith, \$130 on November 15, 1874, and on the 15th of January, 1875, said Murphy paid said Smith \$120, and about February 1, 1875, \$30—aggregating \$280; 3d, that the balance received by Murphy from Tanner, after deducting said payments, amounts to \$120.

The chancellor rendered his final decree sustaining the register's report.

Appellants now assign as error: 1st, overruling the demurrers; 2d, in decreeing the deed to be a mortgage; 3d, in rendering the decree.

W. D. BULGER, for appellants.—1. The third ground of demurrer should have been sustained; this action involved the titles to real estate, as shown by the bill in which the heirs of John C. Tanner were interested, and they should

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have been made parties. Lands descend directly to the heirs of decedents—Revised Code, § 1888.

2. The fourth ground of demurrer should have been sustained. The bill shows that the deed made by William Murphy and wife was entirely different and disconnected with the mortgage made by Thos. J. Murphy and wife, involving different rights as to property and persons. *Colburn et al. v. Broughton et al.* 9 Ala. 351; *Chapman v. Chinn*, 5 Ala. 397.

3. To convert a conveyance, absolute on its face, into a mortgage, the *intention and understanding* of both the parties, to that effect, must concur; the fact that the party who executed the conveyance so understood it, is not sufficient. *West and Wife v. Hendrix*, 28 Ala. 226,—and the complainant must show this *affirmatively*.—*McNeils v. Norsworthy*, 39 Ala. 156. The fact that complainant fails to examine the subscribing witnesses to the deed, will justify the court in looking to the proof of other witnesses with greater jealousy and stricter scrutiny.—*Hatfield v. Montgomery et al.* 2 Port. 58.

4. In this case, a pre-existing debt existed between William Murphy and Tanner, but all the proof shows that the evidence thereof was given up on the purchase of the bond, and the debt satisfied. In such a case, the deed made to the land in consideration of the satisfaction of the mortgage, can not be converted into a mortgage.—*McKinstry v. Conly*, 12 Ala. 678.

5. A debt is necessary to the existence of a mortgage. If none exists the transaction can not be deemed a mortgage. If, as the facts show, the complainant, William Murphy, was in debt to J. C. Tanner, now deceased, and the debt was secured by mortgage on land, and in satisfaction and payment of said debt and satisfaction of the mortgage, Murphy sold to Tanner the land, and executed his deed to the same, and Tanner agreed he should have two years to redeem the land, as if sold under the mortgage, the deed can not take effect as a mortgage.—*West and Wife v. Hendrix*, 28 Ala. 226; *Freeman v. Baldwin*, 13 Ala. 246; *McKinstry v. Conly*, 12 Ala. 678.

H. C. LINDSAY, *contra*. (No brief came to Reporter.)

STONE, J.—There are two points upon which the decree in this cause must be reversed. The deed of November, 1873, from Murphy and wife to Tanner, vested the legal title to the lands in the latter. When he died, the title descended to his heirs. The bill seeks to divest the title from Tanner's heirs, and vest it in complainant, Thomas J. Murphy. To

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maintain such bill, and to obtain such relief, it is indispensable that the heirs of Tanner should be parties.—Sto. Eq. Pl. § 188; *Moore v. Murrah*, 40 Ala. 573; 1 Brick. Dig. 753, §§ 1687, 1695; *Ib.* 755, § 1731; *Ib.* 756, §§ 1743, 1745; *Kennedy v. Kennedy*, 20 Ala. 571; *Jennings v. Jennings*, 9 Ala. 286; *Thompson v. Campbell*, 57 Ala. 183.

By executing an absolute deed to Tanner, the complainants armed him with a legal advantage, and rendered it necessary, if they would assert their alleged equity, that they become actors in the litigation. Being forced to seek equity, the rule is inflexible that they must offer to do equity; and if any balance of principal is found due from Murphy to Tanner, such balance bears the statutory rate of interest. *Pearson v. Bailey*, 23 Ala. 537; *Hunt v. Acre*, 28 Ala. 580; 1 Sto. Eq. Ju. § 64e.

It follows, from what is stated above, that the pleadings in this cause must be amended, by making new parties defendants; and this will render it necessary to retake the testimony. Upon certain points, we would prefer that the testimony should be fuller. We mention three, and counsel may discover others:

First. Whether, when the deed was made to Tanner, the note and mortgage were cancelled, or what disposition was made of them.

Second. When parts of the land were subsold, the proceeds of which, it is alleged, constituted the partial payments to the executors, with whose consent and approbation, if any, was this done? Had Tanner any, and what connection with this transaction?

Third. Under what contract of renting, or otherwise, were the lands held and occupied during the year 1875?

As bearing on the main question in this cause, see *McKinstry v. Conly*, 12 Ala. 678; *Eiland v. Radford*, 7 Ala. 724; *Williamson v. Culpepper*, 16 Ala. 211; *Robinson v. Farrelly*, 16 Ala. 472; *Turnipseed v. Cunningham*, *Ib.* 501; *Locke v. Palmer*, 26 Ala. 312; *West v. Hendrix*, 28 Ala. 226; *Peeples v. Stolla*, 57 Ala. 53; *Pearson v. Seay*, 35 Ala. 612; s. c. 38 Ala. 643; *Davis v. Hubbard*, *Ib.* 185; Code of 1876, § 2199.

We abstain from expressing an opinion on the merits of this controversy, because the facts are not fully before us.

Reversed and remanded.

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Bryant, Adm'r, v. Stephens et al.*Bill in Equity to Enforce Vendor's Lien, and for an Account.*

1. *Contract; when altered by subsequent contract.*—Where one gave his promissory note for the excess on an exchange of lands, or for purchase of part of the lands, it being immaterial which, and subsequently gave two notes, with the recital on each that "the consideration for which this note is given, is the following described lands, lying in Coffee county," the land being the same as that upon which the original note was given; *held*, that the contract evidenced by the original note, was altered by the giving of the subsequent notes.

2. *Same; what inadmissible to contradict subsequent contract.*—In the absence of fraud or mistake, such recital will be considered true, and incapable of contradiction by parol evidence; and in no event can such recital be altered by mere inferences from evidence of the original contract.

3. *Contract; how construed.*—Contracts, not offensive to law or public policy, must have effect according to the intention of the parties. To ascertain such intention, regard must be had to the subject-matter, the relation of the parties at the time of the contract, and the law which it is justly inferable they had in view while contracting.

4. *Lien on lands; when created by notes; nature of lien.*—A lien on lands is created by promissory notes when the land is charged with the payment; and, in equity, the nature of such charge is that of an equitable mortgage.

5. *Exchange of lands; lien for the excess.*—When A makes a contract with B for the exchange of lands, and the lands of A exceed in value those of B, and B agrees to pay A for the excess, A, though having conveyed his land to B, will have a lien on all the land conveyed, for the excess which is considered but purchase-money owing him by B. If, however, the contract be for a sale of the excess, and an exchange of the other land, A would have an equitable lien for the purchase-money, only on the part or excess purchased by B.

6. *Priority of mortgage over equitable lien.*—Where A exchanged or sold lands to B, for the excess of which B executed his note to A, after which B executed a mortgage of the same premises to C, such mortgage has priority over an equitable lien created by two notes subsequently executed by B to A, in lieu of the original note and in alteration of the original contract. And it is immaterial whether the consideration of C's mortgage be an antecedent or presently contracted debt.

7. *Lien on several kinds of property; right of party having lesser lien.*—If a creditor has two funds to which he may resort for payment, or has a lien on two parcels of land, or on land and personal property, and another creditor has a lien on only one of the funds or of the parcels of land, or on the land and not the personalty, the latter may compel the former to resort to the funds or property on which the latter has no recourse, and exhaust it before subjecting the other. If, through the former's negligence, he fails to subject any part of the personalty to the payment of his debt, he must bear the consequences; and the value of such property should be ascertained and applied to the extinguishment of his debt, in relief of the lands, for the benefit of the other creditor.

8. *Exception to register's report; when not considered by Supreme Court.*—Where the exceptions to the report of the register do not appear to have been passed upon by the Chancellor, they cannot, for the first time, be considered in the Supreme Court.

APPEAL from the Chancery Court of Coffee.**Heard before the Hon. ADAM C. FELDER.**

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On the 10th of May, 1873, one Josiah Davis filed his bill in this cause, against appellees, Daniel J. Stephens and A. G. Hammond. After the filing of the bill, and before the June term, 1874, when said cause came up for decree and reference, Davis died, and leave was given to revive in the name of W. W. Bryant, the appellant, as his administrator.

The bill avers, 1st, that about November 4th, 1870, Davis traded or sold to said Stephens, certain described lands in Coffee county; that for and in consideration of 120 acres of said land, the said Stephens sold or traded to Davis 280 acres of land in Pike county; that further, for and in consideration of all of said lands first above stated, the said Stephens traded or sold to Davis 200 acres of land situated in said county of Pike, and also at the same time executed his promissory notes to Davis for the balance of \$600, due for the first above mentioned lands, and that Davis executed a deed of the first mentioned lands to Stephens, and put him in possession, and he is still in possession. 3d. That, in consequence of said deed failing to correctly describe the said lands, about the 28th of May, 1872, Davis executed another deed to Stephens correctly describing said lands, and, in lieu of said note for \$600, Stephens (having paid \$100 of the \$600 about Jan. 1st, 1872,) executed his two notes, payable to Davis, respectively, on the 1st of October and 1st of January, 1874; the first for \$106, and the others for \$200 each. Upon each note was written: "The consideration for which this note is given, is for the following lands lying in Coffee county, to-wit:" (here describing the land as first above mentioned); that the first two notes are now due; that by special agreement between Davis and Stephens, the vendor's lien may be enforced against the third note as if it were now due, except interest. 4th. That said Stephens executed to one A. G. Hammond (one of the appellees), a mortgage deed to said first mentioned lands about the 18th of March, 1872, which has not been satisfied; that said Hammond was duly notified by both Davis and Stephens, in person, before he took said mortgage, that the purchase money for said land had not been paid, and was a lien upon said lands.

The prayer of the bill is, that said Hammond be required to come in and surrender his said mortgage, that the same may be cancelled, so far as Davis' interest is concerned; and that said notes may be declared a lien upon said land in favor of Davis, and that the land may be sold for their payment, and that an account be taken, and for general relief.

The said Stephens, in his original answer, admits and avers each and every allegation of Davis' bill to be true.

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The said Hammond, in his original answer, admits that Davis executed to Stephens said deed, but avers that said deed recited on its face that Davis had received of Stephens \$2500, paid for said lands, which was the full amount of the purchase money, which deed Stephens returned to Davis after he had executed said mortgage to Hammond—and said deed is now in Davis' possession. Said Hammond admits that on the 20th of May, 1872, Davis executed to Stephens another deed to said lands, reciting upon its face that in consideration of \$2500, in hand paid by said Stephens; &c. Said Hammond avers that he "knows nothing of said notes mentioned in the third paragraph of said bill, or the special agreement entered into between complainant (Davis), and defendant (Stephens)." Hammond admits that said mortgage was executed to him, as alleged in the bill, and alleges that said mortgage was given in lieu, in part, of a mortgage deed executed by said Stephens to one John R. Darby on the same lands, on the 26th of April, 1871, to secure a present indebtedness contracted at the time of the execution of said mortgage, which mortgage had been transferred by said Darby to Hammond, in May, 1871, for a valuable consideration. Said Hammond denies that he ever had notice that there was any of the purchase-money for said lands unpaid, until long after the execution of said mortgage by Stephens to Hammond.

At a subsequent term, Stephens was allowed to amend his answer, which was objected to by Bryant (Davis' administrator, Davis having in the meantime died), on the ground that it denied the averments of his original answer. In such amended answer, Stephens denies that all of said lands were sold to him, and avers that he exchanged for a portion of said lands, and executed therefor a deed to certain lands in Pike county, and that he then purchased the excess of Davis' lands for \$600, and executed his note therefor on the 4th of November, 1870; that said Davis executed to him a full deed therefor, admitting full payment; that Stephens went immediately into possession thereof, where he still remains.

Stephens was allowed, over complainant's objection, to introduce parol testimony to disprove the written recitals in the deeds and notes, and also, as appellant claims, "to disprove his solemn admissions and statements in his original answer, and to prove a payment of one hundred and twenty-five dollars, after he had solemnly admitted that there had been no such payment." This proof was of the averment in the amended answer.

The following assignment of errors will show the points raised :

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1. Allowing the original answer sworn to in Davis' lifetime to be amended by an answer—sworn to since Davis' death—denying all of the allegations of the original answer.

2. In allowing Stephens to testify to transactions with and statements of appellant's intestate, without being called to do so by appellant, and thereby make evidence for himself.

3. Allowing Stephens to introduce parol evidence as to what the trade was, and thereby contradict, vary, or add to the written evidence as contained in the deed and notes.

4. The final decree, at the June term, 1874, that complainant was entitled to a lien on only 120 acres of the land mentioned in the bill, as against Stephens.

5. In decreeing the respondent, Hammond, was an innocent purchaser without notice of complainant's lien as to all the lands.

6. In the chancellor's order to the register to state an account, and not ordering him to ascertain what amount of Hammond's mortgage was given on a present, and what for a past consideration at the date of the mortgage; what amount Hammond has received of the personal property; what amount had been wasted or used by Stephens; and deducting the past consideration from the amount found due Hammond, and charging Hammond, as against complainant, with the amount of such personalty included in the mortgage, as well as the property still remaining in Stephens' hand as the property which Hammond suffered Stephens to waste or use, and also to ascertain what amount Stephens had paid Hammond on the mortgage.

7. The register erred in stating the account, in receiving Stephens' amended answer as evidence, in proving a payment made by Stephens to respondent's intestate, &c.

J. E. P. FLOURNOY, for appellant.

W. D. ROBERTS & G. T. YELVERTON, *contra*.

BRICKELL, C. J.—1. We do not deem it material to inquire whether the original contract between Davis, the intestate of the appellant, and Stephens, was an exchange of lands, and the lands of Davis exceeding in value the lands of Stephens, for such excess, the latter gave his promissory note, which was taken up by the present notes; or whether it was an exchange of part, and a sale of part of the lands, and the original note was for the purchase-money of the part sold. Whatever that contract may have been, it was altered by the subsequent agreement between the parties, shown by the present notes. Each of these express, the con-

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sideration for which this note is given, is the following described lands lying in Coffee county, with an immediate description of the lands by the governmental survey.

2-3-4-5. If this recital be true, and in the absence of fraud, or mistake, averred, and admitted or proved, as between Stephens and Davis, it must be accepted as true, incapable of contradiction by parol evidence, and in no event capable of alteration or contradiction, by mere influences from evidence of the original transaction. A lien on the lands is created by the notes. The lands are charged with the payment of the notes, and in equity the nature of the charge is a mortgage. Contracts, not offensive to law or public policy, must have effect according to the intention of the parties. In ascertaining the intention, we must regard the relation of the parties at the time of the contract, its subject-matter, and the law, which it is justly inferrible they had in view in contracting. There had been exchanges of land between Davis and Stephens, is a fact not controverted. The entire transaction, it is apparent, was, that Davis should acquire the lands held by Stephens in Pike county, and Stephens should acquire the lands held by Davis, in Coffee county. The lands of Davis exceeded in quantity, and in value, the lands of Stephens. If the original contract was of exchange and Stephens agreed to pay Davis the excess in value of his lands, though Davis may have conveyed, he had a lien on all the lands conveyed, for the excess, which was in fact but purchase money, owing him by Stephens.—*Burns v. Taylor*, 23 Ala. 255. If it was not wholly of exchange, but a sale of a part, and an exchange of the other lands, he had an equitable lien on the part which was sold for the unpaid purchase-money. Standing in this relation, contracting in reference to the same subject-matter, the original note of Stephens is surrendered, that note being a lien on the whole, or on a part of the lands described in the new notes. The lien of the original note, was the implied, equitable lien of a vendor, who parts with the legal estate for unpaid purchase-money. The new notes are executed, and on their face express as their consideration certain lands. The recital of the consideration must be rejected as useless, or it must be regarded as the declaration of a charge on the lands for the payment of the notes. Davis intended to acquire, and Stephens intended to charge the lands, or this recital is unmeaning, in addition to being untrue. We give it effect, and allow a motive for its introduction, when we construe it as creating a charge, or lien on the lands, of the same nature as the equitable lien of a vendor, which a court of equity implies and enforces. It was this lien which was in the

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minds of the parties when the notes were made to express the fact and consideration which raises the lien. In *Donald v. Hewitt*, 33 Ala. 548, it is said, "Every agreement for a lien, or a charge *in rem*, constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage." This lien being created by express contract, displaces the lien a court of equity would imply, because it is a security Davis carved out for himself.—*Foster v. Athenaeum*, 3 Ala. 302. It is, therefore, we repeat, unimportant what was the original contract, or the original consideration of the notes. They declare a lien on the lands described, which must be enforced, and the Chancellor was in error in limiting it to a part only of the lands.

6. The notes were given, and the alteration of the original contract made subsequent to the mortgage to Hammond. The notes operating as an equitable mortgage, are subordinate in lien to the mortgage to Hammond. Nor is it at all of consequence, whether the consideration of Hammond's mortgage was an antecedent or a debt contracted presently on the faith of it. Either is a sufficient and valuable consideration to support it, and being prior in point of time, it is prior in right to that created by the notes of Stephens to Davis. No inquiry as to the rights of a *bona fide* purchaser to protection against prior equities is involved. By his mortgage Hammond not only acquired the legal estate, but the prior equity, and as between him and the appellant, the rights and equities of a senior and a junior mortgagee are involved.

7. Hammond is, however, bound to exhaust the personal property conveyed by the mortgage to him, before he has recourse to the lands. The general principle of a court of equity is, that if a creditor has two funds to which he may resort for payment, or has a lien on two parcels of land, or on land and personal property, and another creditor has a claim or lien on one only of the funds, or on one only of the several parcels of land, or on the land and not the personal property, he cannot be disappointed by the election of the former to take payment from the fund or lien on which only he can have recourse. He may compel the latter to resort to the fund on which he has no recourse, or to the property on which he has no lien, and exhaust it before subjecting the other.—*Cheeseborough v. Millard*, 1 Johns. Ch. 409; *Aldrich v. Cooper*, and notes, 3 Lead. Eq. Cas. 198. If, after the notice of the lien of Davis, Hammond, from a want of proper dili-

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gence, has failed to subject any part of the personal property to the payment of the debt due him, the loss ensuing must not be visited on Davis. It was his own negligence, and he must bear the consequences of it. The value of such property should be ascertained and applied to the extinguishment of the debt due him, in relief of the lands, for the benefit of Davis.—*White v. Brown*, 2 Cush. 412; *Lewis v. DeForrest*, 20 Conn. 427.

8. The exceptions to the report of the register do not appear from the record to have been passed upon by the Chancellor, and cannot, for the first time, be considered in this court. They are now immaterial, as they fall with the reversal of the decree.

Let the judgment be reversed, and the cause remanded.

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Statutory Real Action in Nature of Ejectment

1. *Mortgage of homestead under exemption act; separate examination of wife.*—A mortgage of the homestead under the act "to regulate property exempted from sale and the payment of debts," (Acts 1872-3, p. 64), required the voluntary signature and assent of the wife, which could be shown only by her examination, touching the same, separate and apart from her husband.

2. *Same; when mortgage void; subsequent acknowledgment no avail.*—A mortgage of the homestead without the formalities required by said act is absolutely null and void; and, it not being regarded an instrument imperfectly executed, which may be afterwards perfected, a subsequent acknowledgment will not validate it and can have no retroactive effect.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. H. D. CLAYTON.

On March 13th, 1875, one Watson and wife executed their promissory note to the appellant, James W. Balkum, for \$75, due October 1st, 1875, to secure the payment of which they executed a mortgage to appellant upon their homestead, it being the property of the husband, consisting of 400 acres of land. Their joint acknowledgment of said mortgage was taken the same day before a notary, but the wife was not examined separate and apart from her husband touching her signature and assent to the mortgage. The indebtedness was not paid, and on the 29th day of July, 1876, said Watson being indebted to the appellee, William H. Wood, in a past due sum, said Wood obtained from Watson a mortgage upon the same land and homestead previously mortgaged to

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Balkum. The mortgage to Wood was executed by the wife, she joining with her husband in the acknowledgment, and in this instance was examined separate and apart from her husband as to her assent, &c. Wood was informed and knew at the time of the execution of the mortgage, all about the prior mortgage to Balkum, and that the debt due under said prior mortgage was still unsatisfied. Afterwards, the said Watson and wife surrendered the mortgaged homestead to Balkum, and the wife made an effort in writing to satisfy or to complete the execution of the first mortgage; went again before the notary and acknowledged the same, separate and apart from her husband. The land was advertised and sold by the attorney of Balkum, and Balkum bought the premises and received a deed therefor. He then let said Watson and wife remain on the premises as his tenants. Wood then brought this action of ejectment against said Watson, and Balkum came in and made himself defendant as the landlord of said Watson. On these facts the court, at the instance of Wood, (the appellee here), charged the jury that if they believed the evidence they must find for the plaintiff, to the giving of which charge the appellant excepted and now assigns the same as error.

WM. C. OATES, for appellant.—1. The Constitution of Alabama, art. 10, § 2, provides that no "mortgage or other alienation of such homestead by the owner thereof, if a married man, shall . . . be valid, without the voluntary signature and assent of the wife to the same." I admit that if her signature is not *voluntary* the conveyance is void. But in this case the evidence showed that she gave her *voluntary* assent and signature to the mortgage. And there being no statute of limitations as to the time within which such acknowledgment shall be taken, her subsequent acknowledgment would validate the deed. It was defective only because of the absence of the proof required by the statute, which evidence might be supplied as it was in this case; and here the appellee had full notice of the former mortgage.

2. The appellee admits that his mortgage was given to secure a pre-existing debt, and that there was no new consideration except an extension of the time of payment which did not constitute him an innocent purchaser—even if he had not been informed of the mortgage to appellants.—*Wells v. Morrow*, 38 Ala. 125.

3. It is not the acknowledgment which conveys land; if so it would present the anomaly of having a man's homestead conveyed or not conveyed by the mere knowledge or ignorance of a justice or notary. But the acknowledgment

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of the wife, separate and apart from her husband, is but mere evidence of her assent to the conveyance, though the fact of assent may otherwise exist—hence a subsequent proof of such assent would be sufficient, which may be done by her subsequent acknowledgment separate and apart from her husband.

JAMES G. COWAN, *contra*.—1. The act of April 23d, 1873, (Acts 1872-3, p. 64), and amendment of same with respect to the officer certifying, was the statute in force at the time of the execution of the mortgages in question—appellant's bearing date March 13, 1875, and appellee's July 29th, 1876.

2. A mortgage upon the homestead of a married man, without the voluntary assent and signature of the wife to the same, "is inoperative for any purpose whatever. It is invalid and confers no rights, present or prospective."—*Miller et al. v. Marx*, and *McGuire v. Van Pelt*, in 55 Ala. 344.

3. The only evidence of such assent and signature is the certificate of the proper officer, showing an examination of the wife apart from the husband, and her acknowledgment of her voluntary assent and signature—which certificate must be indorsed upon or attached to the instrument. Without such certificate it is an ineffectual instrument, though it may be a fact that the wife did assent to and voluntarily sign the said instrument.—53 Ala. 558; 42 Ib. 293; 23 Ib. 326.

4. Upon a failure to obtain the examination of the wife, and a certificate of the same at the time of the execution of the instrument, the defect cannot be subsequently cured by a compliance with the statute, when it would operate to the injury of a third party, whose rights had attached.—52 Ala. 597; 33 Ib. 446; 21 Ib. 169.

5. At the time appellee obtained his mortgage he found recorded the mortgage of appellant, which was without the prescribed evidence of the wife's assent and signature. The statute directed where—if the fact of such assent and signature existed—the evidence of it should be found. It directed that it should appear indorsed upon or attached to the mortgage. Not finding any such indorsement, and no other evidence of such assent and signature being permissible, appellee reasonably presumed that such assent and signature did not exist, and that said mortgage was "inoperative for any purpose whatever—was invalid, and conferred no rights, present or prospective."

STONE, J.—1. When the mortgage of Watson's homestead, under which appellant claims, was executed March 13th, 1875, the act to "regulate property exempted from sale

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for the payment of debts," was operative.—Pamph. Acts 1872-3, p. 64. That statute declares that "no mortgage or other alienation of any homestead exempted by this act, by the owner thereof, if a married man, shall be valid, without the voluntary signature and assent of the wife, which voluntary signature and assent must be shown by the examination of the wife, separate and apart from the husband, touching the same, had before a Circuit or Supreme Court judge," &c. Two facts are, by this statute, rendered indispensable to the mortgage by a married man of his homestead; the voluntary signature and assent of the wife, and this must be shown, and can only be shown by her examination touching the same, separate and apart from her husband. Without these, it is as if it had not been attempted, void.

2. A mortgage of the homestead, without these formalities, is not regarded as a conveyance imperfectly executed, which may be afterwards perfected. Until properly acknowledged, it is no instrument—a nullity. Acknowledgment afterwards can have no retroactive effect. The most it can possibly do, is to constitute it a conveyance on and after the properly certified acknowledgment.—*McGuire v. Van Pelt*, 55 Ala. 344, and *Miller v. Marx*, Ib. 322.

The rulings of the Circuit Court were in harmony with these views.

Affirmed.

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Bill in Equity to Enforce Mechanic's Lien.

1. *Retroactive law; when law not construed as.*—A law is not to be construed as having a retroactive effect, unless it is plain from its terms that the legislature so intended.

2. *Same; act amending mechanic's lien law.*—The act of April 19th, 1873, "to amend sections 3101, 3102 and 3104 of the Revised Code," in relation to mechanic's liens has no retroactive operation.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. B. B. McCRAW.

The bill in this cause was filed August 15th, 1874, by Henry Smith, appellant, against appellees, to set up and enforce a mechanic's lien on a certain house and lot in the city of Eu-
 faula, under an act of the legislature, "to amend sections 3101, 3102, and 3104 of the Revised Code of Alabama, and to

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repeal the same," approved April 19th, 1873. The defendants filed their answer and also interposed a demurrer, stating as grounds—1st. That there is no equity in the bill. 2d. That complainant has a full and adequate remedy at law. 3d. That the bill shows on its face that complainant has no lien of any kind on any thing. 4th. That if he had any lien, he has lost it by lapse of time, not having taken any steps to enforce it within one year after the same accrued. The cause came on to be heard, and was submitted on the bill and demurrers, and the Chancellor, in his decree, sustained the demurrers and dismissed the bill. Such decree is now assigned as error.

GOODE and TONEY, for appellants.—The determination of the main question raised by the demurrer, involves a careful consideration of the doctrine of retrospective laws touching civil rights and civil remedies. Laws impairing the obligation of contracts are prohibited to the States by the Federal as well as by most of the State constitutions.—U. S. Const. Art. II, Sec. 10, cl. 1; Ala. Const. Art. II, Sec. 24. Other retrospective laws touching *rights*, are objectionable, and are never construed retrospectively, unless in pursuance of express words, but they are not void.—*Drehman v. Stifle*, 8 Wall. 603. But retrospective laws touching civil *remedies* are not only admitted to be valid, but are comparatively free from objection, unless they materially impair or affect the obligations of contracts.—*Bronson v. Kenzie et als.*, 1 How. 811; 1 Denio, 128; 4 Wall. 548. The act in question is retroactive and should be so construed.

OATES & McLEROY, *contra*.—There is nothing in the act approved April 19th, 1873, (Acts, 1872-3, p. 117,) which indicates an intention on the part of the legislature to make it retroactive. It is not retroactive, except by a forced construction. A retroactive operation will never be given to a statute, unless the intention that it should so operate clearly appears.—*Barron v. Fort*, 18 Ala. 668; *Barnes v. Mayor, &c.*, 19 Ala. 707; *Gould v. Hays*, *Ib.* 438; *Kidd v. Montague*, *Ib.* 619.

MANNING, J.—1. Although, in regard to civil remedies, laws may be enacted which shall have a retroactive operation, the general rule is that they are not to be construed to produce that effect, unless it was manifestly the purpose of the legislature that they should.—*Barnes v. Mobile*, 19 Ala. 707; *Kidd v. Montague*, *Ib.* 624.

2. Such a construction can not be put on the act of April

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19th, 1873, "to amend sections 3101, 3102 and 3104 of the Revised Code," in relation to mechanic's liens. And appellant not having acquired any such lien on the property, concerning which this suit was brought, none was created in his favor by the enactment, subsequently, of the act referred to. The property, therefore, can not be charged, in the hands of the subsequent purchaser, with the payment of the sum due to plaintiff for his services in erecting the building thereon.

Let the decree of the Chancellor be affirmed.

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Bill in Equity to enforce Vendor's Lien.

1. *Private act authorizing administratrix to sell land ; validity of.*—The validity of a special act authorizing a widow in her representative capacity, as administratrix of her deceased husband, to make a private sale of the lands of her said husband and intestate, for the purpose of division among the heirs, is supported by former decisions of this court, and on account of the frequency of such enactments under former constitutions, and the number of titles involved, it is too late to reopen the question as to the legislative power to enact them.

2. *The omission of indispensable parties to a bill*—is an error for which the appellate court will reverse a decree, though no objection to their absence was taken in the Chancery Court.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. HURIOSCO AUSTILL.

William C. Oates, the appellee, as sole complainant, filed the bill in this cause on the 8th of February, 1875, against J. F. Watson, appellant, alleging that he was, in 1874, appointed guardian of Pocahontas Long, since married, and with whom he has made final settlement, and William B., and Mamie Long, children of James B. Long, deceased; that on the 23d of October, 1873, Mary Long, as administratrix of James B. Long, deceased, by virtue of an act of the general assembly, "To authorize Mary J. Long, as administratrix of the estate of James B. Long, her deceased husband, to sell the lands belonging to said estate at private sale," approved April 23d, 1873, sold to said Watson the lands in controversy, as the lands belonging to said estate, and took from said Watson two purchase-money notes therefor—said Mary Long executing her bond with said Oates as surety thereon, conditioned to make a deed to Watson of said land, upon his paying the notes in full; that in 1874, said Mary Long made final settlement of said estate, and in

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part payment of the balance against her she transferred one of said notes to said Oates, as guardian of said distributees, who were minors, and in that way said note became the property of complainant, who sues as guardian; that said note has not been paid, and said Watson is in possession of said land. The bill prays that said Watson be made a party; for a reference; for amount due upon said note; or for enforcement of lien of said note, by sale, &c., of the land, and for general relief.

To this bill the defendant demurred, on the following grounds: 1st, want of equity; 2d, failing to allege a willingness of any of the parties to convey to defendant, by proper deed, said lands upon payment of the purchase-money therefor; 3d, that the bill shows on its face that the said land act of the legislature authorized the said Mary A. Long, *as administratrix*, to sell said land, and that she did not sell in such representative capacity, but as Mary A. Long; 4th, the said bill shows on its face and by all its averments, that the said Mary Long, on her final settlement and discharge of her trust, is rendered unable to comply with the terms of said contract or with the requirements of said act of the legislature." The demurrer was overruled; whereupon the defendant filed answer, and cross-bill, and, upon the hearing, the Chancellor decreed the complainant entitled to relief, and dismissed the cross-bill. The decree is now assigned as error.

JOHN D. GARDNER, for appellant.—1. While the legislature may authorize an administrator to sell lands of an estate to pay debts because they descend to the heirs, subject to the lien of creditors (*Watkins v. Holman*, 16 Pet. 25; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369), and it might be admitted, without effecting this case, that the legislature could pass an act authorizing a sale for distribution upon the application of the parties interested, as in the case of *Chappell v. Doe, ex dem. Williamson*, 49 Ala. 153. But the legislature can pass no act which impairs vested rights, or which involves judicial injury, or which deprives individuals of their property without due process of law. This question is distinctly met and fully discussed in the case of *Pryor v. Downey*, decided by the Supreme Court of California in November, 1875, and reported in the February number of the *American Law Times* for the year 1876. A similar question arose in the case of *Grove v. Todd*, 41 Maryland.

2. Was not Mary J. Long, the widow, an indispensable party to this suit? It is true, she sold the land, but she has never parted with her interest in the proceeds of the sale, and is, no doubt, entitled to a portion of the same in lieu of

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dower. Mary J. Long is an indispensable party to the original bill. Pocahontas Long is also an indispensable party to the bill, and though the question be raised for the first time in this court, the case will be reversed.

WILLIAM C. OATES, (*per se*) *contra*.—1. The appellant contends that the sale of the land is void for the reason that the act of the general assembly (Acts 1872-3, p. 172), is unconstitutional. The soundness of this position is by no means admitted.—49 Ala. 153. But suppose that it be correct, and that the sale is utterly void, the appellant cannot defend against the payment of the purchase-money while he retains possession of the land.—*Burns v. Hamilton*, 33 Ala. 210, and authorities therein cited.

2. No question was made in the court below to the failure to make Mary J. Long and Pocahontas Long parties to the bill, and not being a question of jurisdiction, cannot be made for the first time in this court.

BRICKELL, C. J.—1. The validity of the special statute authorizing Mrs. Long, in her representative capacity, as administratrix of her deceased husband, to make a private sale of the lands of her said husband and intestate, for the purposes of division and distribution to and among the heirs to whom they had descended, is supported by former decisions of this court, which we have neither the power nor inclination to disturb.—*Chappell v. Doe*, 49 Ala. 153; *Holman v. Bank of Norfolk*, 12 Ala. 369. The enactment of such laws was, under former constitutions, frequent; the titles to an immense amount of the real property of the State depend upon their validity, and it is too late to reopen the discussion of the power of the legislature to enact them.

2. We concur in the view which the Chancellor must have taken, that the appellants have failed to establish that there was any fraud or misrepresentation in the sale, or that they had any just claim to damages because possession was not earlier surrendered to them; and if the proper parties were before the court, the decree would be affirmed. The bill is, in this respect, defective. The legal title to the lands descended to the heirs of James B. Long, who must be parties, before the court can render a decree subjecting them to sale for the payment of the purchase-money due from the appellant. No objection was taken to their absence, in the Chancery Court, but the rule has long prevailed in this court, that the omission of indispensable parties is an error compelling a reversal, though objection has not been previously taken — *McMaken v. McMaken*, 18 Ala. 576.

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The decree is reversed and the cause remanded, that the proper parties be made.

Baker v. Flournoy and Wife.

Action to Recover from Wife's Separate Estate, for Medical Services.

1. *Wife's separate estate.*—The object of sections 2705 and 2706 of the Code of 1876 was to abrogate the common law which conferred upon a husband the ownership of his wife's personal estate, when not secured to her separate use, and of her real estate during their joint lives; and to preserve such property as the separate estate of the wife, with her husband as trustee without accountability for rents and profits, but with the intent that the family should, if necessary, be thereby supported.

2. *Same; liability for articles of comfort, &c., under § 2711.*—The statutes, §§ 2705, 2706, were not intended to operate on or make the husband manager of any other proper of the wife than that of which he would have become the owner by virtue of the marriage, but for such enactment. And it is only such property that, by section 2711 of the Code, is made liable for "articles of comfort and support of the household," &c.

3. *Same; estate in remainder, &c; marital rights do not attach.*—At common law, the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate. And the same is not subject to the debts of the husband for necessities, comforts, &c. (Strong, J., dissenting.)

APPEAL from the City Court of Eufaula.
Tried before the Hon. E. M. KEELS.

JOHN D. ROQUEMORE, for appellant.—1. The averments of the complaint clearly bring the estate sought to be charged, under the operations of Art. 3, Ch. 1, Title 5, Part 2d, of the Revised Code. Section 2371 of said article, declares *all* property of the wife, held by her previous to the marriage, or to which she may become entitled *after* the marriage, *in any manner*, to be her separate estate. There is no limitation as to the extent, quantity, or duration of the interest required. Whether it consists of a fee simple title to real estate, or a mere temporary interest in personalty, it is alike her *separate estate*, if acquired either as contemplated in section 2371, or section 2388, Rev. Code, and is subject to be made liable to the satisfaction of such demands as are specified in § 2376 Revised Code, which is also in article 3, above referred to.

2. It may be insisted by appellees that an estate, to be made liable under said article 3, must be one to which the

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wife has legal title as well as possession. But such a construction would contradict the spirit of the statute. If the *title be vested* it matters not how small nor how large the estate, it is liable if the other conditions concur.—§ 2376, Revised Code.

3. A vested remainder may be sold and conveyed, or levied on under an execution, and why not become a married woman's separate statutory estate, and liable to the payment of such debts as are named in section 2376 of the Revised Code?

GOODE & TORREY, *contra*.—1. To sustain such an action as this, two things are requisite, namely: 1st, the *debt or liability* on which recovery is sought, must be of a specified character.—See Revised Code, § 2376, and, also, the analysis of Judge STONE in *Durden and Wife v. McWilliams & Smith*, 31 Ala. top page, 442; 2d, the *estate of the married woman* sought to be subjected, must be of a certain character.—See the opinion of Judge WALKER in the case of *Ravesies and Wife v. Stoddard & Co.* 32 Ala. 601 to 606.

2. Applying the most approved definition of a "remainder" to the estate of Mrs. Flournoy, described in the complaint, and the conclusion must be that the estate is a *vested remainder*, dependent upon the termination of the life estate in said property, and not subject under the Code to this action. Hence, the demurrer was properly sustained.

[The brief contains an elaborate and able argument reaching to the conclusions here noted.]

MANNING, J.—This action was brought by appellant for medical services rendered, and medicines furnished for the support and comfort of the household of defendants, S. J. Flournoy and Eliza Flournoy, his wife; and the complaint alleges, that at the time the debt was contracted, said Eliza J., was owner of an undivided one-seventh part of certain real estate, situated in Barbour county, and particularly described in the complaint, "said interest of said Eliza J. Flournoy being a vested remainder in said property after the termination of a life estate in the same to Sarah Toney, who is now in life."

A demurrer was sustained to the complaint upon the ground that an estate of which defendants had no present beneficial enjoyment, was not liable by virtue of the statute under which the suit was brought.

The question presented is a new one, and must be determined by a consideration of the enactment known as the "married woman's law," in connection with a doctrine of the common law relating to property so situated.

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1. The language of the statute is: "All property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband."—Code of 1876, § 2705 (2371). "Property thus belonging to the wife, vests in the husband as her trustee, *who has the right to manage and control the same*, and is not required to account to the wife, her heirs, or legal representatives, for the *rents, income and profits thereof*; but such rents, income, and profits are not subject to the payment of the debts of the husband."—§ 2706 (2372). These are the two principal sections of the statute. Its object was to abrogate those provisions of the common law, which conferred upon a husband the ownership of his wife's personal estate, when not secured by some settlement to her separate use, and of her real estate during their joint lives—whereby such property might be subjected to the debts, or disposed of at the pleasure of the husband, and the wife be brought to want—and instead thereof, to preserve this property as the separate estate of the wife, while continuing in her husband the management of it as trustee, without accountability for the rents, issues and profits, but with the intent that the family should, if necessary, be thereby supported and maintained.

2-3. The statute was not intended to operate on, and make the husband manager of, any other property of the wife than that of which, but for this enactment, he might, by virtue of the marriage, have become the owner. Upon this principle it is, that the construction is established that prevents it from reaching property, real or personal, which, by the instrument through which it comes to the wife, is so secured to her, as to be put beyond the husband's marital power, as was said in *Short v. Battle*, (52 Ala. 465). "In the absence of the statute, if the husband did not renounce his marital rights, the property of the wife became the property of the husband. He had unqualified dominion over her personal property, and of her real estate, but a mere reversion was left in the wife or her heirs. Having title, it was subject to the payment of his debts, and he could alienate or devise it at pleasure. To take away these common law rights of the husband, and to define and regulate the manner in which the property of the wife should be held, *to which these rights would have attached*, was the only purpose of the statutes." And it is only this same property, that by section 2711 (2376), is made liable to be subjected to the payment for "articles of comfort and support of the household, . . . suitable to the degree and condition in life of the family," &c. Now, no

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such common law rights of the husband attach to realty in which the wife has only a remainder or reversion, expectant upon the termination of a precedent life estate. The seisin and possession are in the person who has the freehold estate for life. And, "curtesy, like dower, can only be had of an estate in possession; that is, if the wife's estate is only in remainder or reversion, expectant on the termination of a life estate or other freehold, which is vested in some third person, the husband can not have curtesy, 'unless the particular estate be determined or ended during the coverture.'"

1 Bish. Law of Mar. Women, § 489; Co. Lit. 29a; *Bank v. Davis*, 31 Ala. 631; *Mackey v. Proctor*, 12 B. Monroe, 433; *Tayloe v. Gould*, 10 Barb. 400; *Blood v. Blood*, 23 Pick. 80; *Shoemaker v. Walker*, 2 Serg. & R. 554. By the common law, therefore, such a remainder in realty, as the estate of Mrs. Flournoy is alleged in the complaint to be, was not, nor was any interest therein, liable to be sold by the husband, or subject to his debts; nor could he take any management or control of the property, or derive any "rents, income or profits" from it, so long as the precedent life estate continued. Until that is ended, there is no such estate in the wife as requires the protection which the law in question was designed to give. A construction of it, that would bring property thus situated into a condition which might subject it to sale under very great disadvantages, for the payment of debts that are properly those of her husband, personally, would be giving to the statute an operation conflicting with the object of the legislature in enacting it, and is, therefore, inadmissible.

Let the judgment of the City Court be affirmed.

STONE, J., dissenting.

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Mayor and Councilmen of Union Springs v. Jones.

Action against Town for Damages, Caused by Erecting a Sewer and Flooding Plaintiff's Land.

1. *Municipal corporation diverting water from streets; when liable in damages.* If the corporate authorities of a town, in diverting water from their streets, discharge it by artificial means, in increased quantities and with collected power and destructiveness, upon the lands of others, the corporation is liable for damage thus occasioned.—(See *Mayor, &c., of Troy, v. Coleman*, present volume.)

2. *Permission by former owner to erect a conduit; when purchaser no cause of action.*—If the owner of a lot gives the corporate authorities, or their employees, authority to erect a conduit, or water escape, through it, in the manner in which it exists when the lot is sold by another, the purchaser has no cause of action so long as there is no change in the structure or increase in the flow of water.—(Case above cited.)

3. *Measure of damage to present owner; what plaintiff can not show.*—Where the purchaser is not precluded from recovering by some act of the former owner, the measure of damages is the injury to the lot after he became owner; the difference in value of the lot between the time the conduit was erected and the suit brought, is not a proper criterion of damages; nor can the plaintiff show, in the absence of the averment of special damages, that by reason of the flow of water on the lot his tenant left the premises.

APPEAL from the Criminal Court of Bullock.

Tried before the Hon. C. J. L. CUNNINGHAM.

This was an action brought by Kimbrough T. Jones, appellee, against the Mayor and Councilmen of the Town of Union Springs, for ten thousand dollars damages, for erection of a conduit or sewer on the west side of the premises of plaintiff, which sewer, as plaintiff claims, was so constructed by defendant that it unnecessarily and unlawfully changed the direction of the flow of the rain water, causing it to flow in large quantities upon, and damaging the plaintiff's premises; and defendants kept up said sewer causing said flow to continue for a long time, tearing up and still tearing up and washing and injuring the land and premises of the plaintiff. Before the plaintiff became owner of said land it belonged to the estate of one D. A. McRae, and was purchased by plaintiff from one Mrs. Lucy McRae, administratrix of said estate. The conduit was erected before the purchase by plaintiff, and with the permission of said Mrs. McRae.

On the trial, the court admitted evidence of the damage done to the premises from the time of erecting the conduit

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to the day of suit, to which the defendant excepted. Evidence was also admitted against the objections of defendant, of the difference in value of the lot at the time of the suit and when the conduit was constructed, to which defendant excepted. The plaintiff was also permitted to prove that there were houses on the premises which had been rented out, but when the water broke over the lot and ran up to the house it caused the tenants to leave, wherefore he lost rent. The defendant moved to exclude such testimony, but the court permitted the testimony to go to the jury, and defendant excepted. The complaint contains no averment of special damage. There was a demurrer, alleging several grounds, which was overruled. The rulings of the court against defendant are now assigned as error.

ARRINGTON, TOMPKINS and McCALL, for appellants.—1. The evidence, as to damage done to plaintiff's lot from the time of the erection of the sewer, was clearly illegal. Plaintiff could only recover damage done after he went into possession.

2. The proof of damage done by loss of tenants and rent, was illegal. There were no averments of special damage. See *Donnell v. Jones*, 13 Ala. 490; *Lewis v. Paull*, 42 Ala. 136.

3. The carelessness and negligence of defendant is the *gravamen* of the whole action. In the location of sewers the city council acted in a quasi legislative capacity, but in the construction of the sewers they acted ministerially.—See *City Council of Montgomery v. Gilmer et al.*, 33 Ala. 130. Many courts have held that there is no liability attaching, even though the duty is performed in a careless and negligent manner.—Dillon on Municipal Corporations, 783, 801; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Turner v. Dartmouth*, 13 Allen, 291; *Flagg v. Worcester*, 13 Gray, 601; *Bangor v. Lansil*, 51 Me. 521; *Dorman v. City of Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253.

WATTS & WATTS, *contra*.—1. Causing the rain water to flow from its natural channel and by means of a sewer, to accumulate on the lot of plaintiff, constituted a cause of action against the town.—See 2 Dillon on Munic. Corp. § 799.

2. The corporate authorities of a town or city have no right, by reason of their control over the streets, and their power to grade, intentionally to divert the water therefrom, and discharging it, by artificial means, in increased quantities, and with collected force, upon the property of an adjoining owner of lots.—See § 799, Dillon on Cor., on p. 933, and authorities in note 1; Angell on Highways, § 221; *Beaty*

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v. Armstrong, 8 Watts & Serg. 40; *Foot et al. v. Bronson et al.* 4 Lans. (N. Y.) 47; *Livingston v. McDonald*, 21 Iowa, 167, an opinion by Judge DILLON.

These same authorities hold that the negligent or unskillful exercise of this ministerial authority by the agents of the corporation, makes the corporation liable.

3. The objections to the evidence by defendants were properly overruled.

4. The continuance of the wrong is a wrong itself, and damages, in all such cases, may be recovered to the time of the trial.—See *Cromelin v. Cox & Co.* 30 Ala. 318.

STONE, J.—1. The case of *Mayor and Councilmen of Troy v. Coleman*, 58 Ala. 570, is decisive of many questions raised by this record. In that case we said, adopting the language of Judge DILLON in his work on Municipal Corporations, § 799, “we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and discharge it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.” This disposes, adversely to appellants, of one line of the defense relied on.

2. In that case we also said, “appellant proposed to prove that one of the sewers complained of by plaintiff, . . . was put there at the request of Joel D. Murphree, who owned said lot at that time—that is, the lot now belonging to plaintiff—to which the damage was done. But the circuit judge ruled that this could not be done. It seems to us that in this there was error. If the former owner, who had power to charge the lot with any servitude in favor of the public, expressly authorized the building of one of the structures complained of, in such situation and manner, as that it would naturally turn upon the lot a large portion of the water which they decided to divert from the streets, he thereby deprived himself of any right of action against the corporation for that which he, with a knowledge of the consequences to his property, induced the authorities to do. And he could not, by a transfer of the lot to another, invest his alienee with larger rights than he himself had. The purchaser would take the property *cum onere*.” Under this principle, if Mrs. McRae, the former owner of the lots, and while she was the owner, gave to the town council, or its employes, authority to erect the conduit, or water escape, and the same was erected, and remained there when Jones

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purchased, and there was no change in the structure which caused an increased flow of water, and increased damage to plaintiff's property, this would be a complete defense to the present action. Many of the rulings of the criminal court were in conflict with this view, and the result is that the judgment must be reversed.

3. The criminal court also erred in receiving evidence of the difference of value of the lots between the time when the conduit or aqueduct was erected, and the commencement of this suit. This did not and could not furnish a criterion of damages, to which the plaintiff was entitled. He could only recover for the injury done his property after he became the owner. Nor, in the absence of an averment of the fact as special damages, should the plaintiff have been allowed to prove the loss of a tenant of his property, caused by the water-flow.—*Donnel v. Jones*, 13 Ala. 490.

The exceptions in this record are very numerous, but we think what is said above will furnish a sufficient guide on another trial.

Reversed and remanded.

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Action on Promissory Note.

1. *Claim against decedent's estate; what necessary presentment to avoid bar of non-claim.*—A presentment which will avoid the bar of the statute of non-claim, must give such information of the existence of the claim that the personal representative may determine—assuming its validity—how far he can safely proceed in the administration of the estate as solvent. If a mere statement of the claim is relied on as a presentment, it should describe the claim with such accuracy that it may be distinguished from all similar claims.

2. *Same; when statement of claim insufficient.*—A statement of a claim presented by an administrator which does not show of what estate he was administrator; whether it was payable to him or his intestate; or when the note was executed; or whether the obligation was joint or several; or whether it bore interest from date, and gave no description of the claim which would distinguish it from other notes for a similar amount, payable at the same date, is not sufficient to avoid the bar of the statute of non-claim.

3. *Charge; right of party to favorable instructions.*—A party has a right to instructions favorable to him, based on a hypothesis which the evidence tends to support; and such charges are not objectionable because founded on a partial view of the evidence.

APPEAL from the Circuit Court of Chambers.
Tried before the Hon. LITTLEBERRY STRANGE.

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This was an action brought by John W. Mitchell, as administrator with the will annexed of one Jas. S. Mitchell, deceased, against Jefferson Falkner and Benjamin S. Bibb, executors of one William B. S. Gilmer, deceased, for \$4,080, due by two promissory notes made by their testator, together with M. H. Mitchell and Robert Mitchell, on the 3d of January, 1859, one for \$2,167.50, due twelve months after date, and the other for \$1,912.50, due two years after date.

The defendants pleaded, 1. "That the notes described in the complaint were not presented to them, nor said notes nor a statement thereof filed, nor said claims docketed in the office of the judge of probate of Chambers county within eighteen months after the granting of letters testamentary to the defendants, or within eighteen months after the 21st day of September, 1865, or within eighteen months after the accrual of said claims. 2d. And as a further answer to the complaint, they say, that their said testator, William B. S. Gilmer, deceased, in his life-time, did not undertake or promise as the said plaintiff has thereof complained against them as his executors. 3d. That Mrs. Martha H. Mitchell, the principal maker of said notes, fully paid off and satisfied the same, before the commencement of this suit."

The plaintiff introduced in evidence the notes sued upon, and also introduced the docket kept in the office of the judge of probate of Chambers county, as the docket kept and used for the purpose of registering claims filed against estates of deceased persons, and which was proven by the judge of said court to be the docket kept for that purpose, the same showing the following entry: "Estate of W. B. S. Gilmer, 1866, June 6, account filed by the C. & O. R. R. Co. . . \$3825.00. Oct. 9, one note filed by S. Spence, adm'r, due 3d Jan. 1860, for \$2167.50. Oct. 9, one note filed by S. Spence, adm'r, due 3d Jan. 1861, for \$1912.50.

Plaintiff proved, by the judge of probate (Appleby), that said entry on the said docket, in his account of the C. & C. R. R. Co., and the date, June 6, was made in the handwriting of one Judge Richards, and the entry dated Oct. 9th, in reference to the claim filed by S. Spence, adm'r, was in his (Appleby's) handwriting; that said S. Spence never filed any claims in his office against the estate of W. B. S. Gilmer, at any time; that he did not remember when said entry was made in the said docket; that he had no recollection when said entry was made, except from its date, but believes from the date in the handwriting of Judge Richards, that the entry was made the 9th of October, 1866.

S. Spence was introduced by the plaintiff as a witness, and he testified that on the 9th day of October, 1866, he handed

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the notes now sued on to Judge Appleby, and that Judge Appleby, with the notes before him, made the said entry above referred to. He was not asked whether he filed said notes in the probate court. He further testified, that sometime in October, 1866, after the said entry was made by Judge Appleby, he met Jeff. Falkner, one of the defendants, at the probate office, and called his attention to the entry; that said Falkner seemed surprised at said entry, and asked him about the claims referred to in said entry, and said Spence then told him of the claims sued on, giving him full information as to date, amount, when due, and the parties to the same, and that he looked to the estate for their payment; that he had never presented the said note to either of the defendants, unless what he stated above constituted a presentment.

On cross-examination of said Spence, the defendants asked him whether there was not an understanding and agreement between him and said W. B. S. Gilmer, in his life-time, and Mrs. M. H. Mitchell, that her distributive share in the estate of James S. Mitchell, deceased, should be applied to the payment of the notes now sued on, and whether he had not paid over to said Mrs. M. H. Mitchell, after said agreement and understanding, six thousand dollars of her distributive share in said estate of James S. Mitchell, deceased, without the consent of said W. B. S. Gilmer? This question was objected to by the plaintiff, but the objection was sustained, the defendants reserving an exception. Before this objection was made, it had been proved that the maker of the notes sued on (M. H. Mitchell) was the widow of said James S. Mitchell, deceased, and that said W. B. S. Gilmer and Robert Mitchell, the other two makers of the note, were her securities. It was also proven, that the notes sued on were given for negroes, three in number, and some other personal property bought of said S. Spence as administrator with the will annexed of the said James S. Mitchell.

The defendants asked said witness, if there was not an understanding and agreement, whilst he had the distributive share of the said M. H. Mitchell in said James S. Mitchell's estate in his hands, between him, M. H. Mitchell and W. B. S. Gilmer, after the maturity of the notes, that the said funds should be retained by him and that he should apply them to the payment of the notes now sued on? To this question the plaintiff objected, and was sustained by the court, the defendants excepting. Defendants then asked the witness whether he had not paid over to Mrs. M. H. Mitchell, after the maturity of said notes sued on, the sum of \$5,300 of her distributive share, and while he continued as the representa-

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tive of James S. Mitchell's estate. To this question the plaintiff objected, and the court sustained the objection and refused to allow the said question to be answered, to which the defendants reserved an exception. Defendants then asked the witness whether the said Gilmer in his life-time, while he (witness) was the representative of the said estate of J. S. Mitchell, and while he held the funds which he afterwards paid over to Mrs. M. H. Mitchell as part of her distributive share in said estate, and after the maturity of the said notes sued on, had not notified him not to pay the said distributive share to Mrs. M. H. Mitchell, but to retain them and apply them to the payment of said notes? To which question the court sustained plaintiff's objection and defendants excepted. Defendants then asked the witness if Mrs. Mitchell had not agreed that her distributive share of the estate of her husband, then in the hands of witness, should be applied to the payment of the notes sued on? To which the court sustained plaintiff's objection, and defendants excepted. The defendants then proposed to prove by witness that Mrs. Mitchell had agreed with the said Gilmer that her distributive share of the estate of James S. Mitchell should be applied to the payment of the notes sued on, and that this agreement was made known to the witness while he was the administrator of said J. S. Mitchell, and while witness held the funds in his hands that afterwards, and without the consent of the said Gilmer, witness paid over (while he continued to be such administrator) to the said Mrs. M. H. Mitchell (\$6,000) as part of her distributive share in the estate of said J. S. Mitchell; to which evidence the plaintiff objected and was sustained by the court, the defendants excepting.

The defendants introduced as a witness Jeff. Falkner, who testified that the claims now sued on were never presented to him until after the commencement of this suit, and that his attention was never called to the entry on the docket in the Probate Court until after the commencement of this suit; that he had no recollection of ever having any conversation with Mr. Spence in reference to the said claims until after the commencement of this suit; that he remembered having his attention called to the entry in the fall of 1868, after this suit was brought, not before; and that he was very much surprised, and so expressed himself, that the claims now sued on were the claims referred to on the docket.

The evidence further showed, that letters testamentary were granted to defendants on the 22d of June, 1865, and that on the 28th of July, 1871, new letters were granted to defendants, under the influence of the decision of *Bibb & Falkner v. Avery*.

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The above being, in substance, all the evidence, the defendants asked the court to charge, in writing, "1. That if the jury find the only evidence of the presentation of the claim sued on, is what is found on the docket of claims in evidence, this does not amount to such a presentation of the claim to the executors as is required by law, and on that question the jury should find for defendants." 2d. That if the only evidence before the jury, of the filing of the claims sued on, is that in evidence before them, from the docket of claims from the Probate Court, then these notes are not filed as required by section 2241 of the Revised Code of Alabama."

The court refused to give either of said charges, and defendants excepted.

The rulings of the court adverse to defendants, are now severally assigned as error.

FALKNER, and WATTS & SONS, for appellants.—1. Under the influence of recent decisions, the questions arising on the demurrer to the special pleas, or to other parts of the pleading, can not be noticed by the court. The questions thus raised by this record, arise out of the several refusals to admit testimony, and the refusal to allow certain questions to be propounded to the witness Spence, and to the refusal of the court to give two charges; all of which questions are shown in the bill of exceptions. The evidence proposed to be made by the witness Spence, tended to show a payment by the principal maker of the notes sued on, and were, therefore, competent evidence. The evidence showed that Mrs. M. H. Mitchell was the widow of James S. Mitchell, deceased, and that she was entitled to a distributive share in said estate of Mitchell, and that W. B. S. Gilmer and Robert Mitchell were the sureties of Mrs. M. H. Mitchell on the notes sued on; and that S. Spence, the witness, had been the administrator in chief of the said James S. Mitchell, and that the notes now sued on were given to him, as such administrator, for personal property of the estate sold by him to Mrs. M. H. Mitchell.

2. Mrs. Mitchell, as distributee of the estate, had the right to direct her distributive share in the estate to be appropriated to the payment of the notes. If she made such agreement with Gilmer, and the administrator Spence assented to this arrangement, then he had no right afterwards to pay over to Mrs. Mitchell said distributive share without the consent of Gilmer, the surety; and such payment, by said Spence, discharged Gilmer, the surety, from liability on said notes to the extent of the amount so paid to Mrs. Mitchell. It was proposed to show that the sum so paid to her, was

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more than enough to pay and discharge the amount due on the said notes. But whether it was or was not sufficient to pay the whole amount due on the notes, the amount, whatever it was, should have been applied to the payment of the notes, and the appellants were entitled to this evidence under the pleas on which issue was joined. When the creditor has in his possession money or property of the principal debtor, which he may rightfully retain and apply to the satisfaction of the debt, and instead of retaining it he suffers it to pass into the hands of the principal debtor, the surety is discharged to the extent of the amount so paid to the principal debtor.—See *Perrine v. F. Ins. Co. of Mobile*, 22 Ala. 575, and authorities there cited; *Allen v. Greene*, 19 Ala. 34; *Cullum v. Emanuel & Gaines*, 1 Ala. 23. The defendants proposed to show, and put to the witness the appropriate questions to show, that by agreement between Mrs. Mitchell, Spence, the administrator, the payee of the notes, and Gilmer, the surety, the fund in the hands of Spence belonging to Mrs. Mitchell should be applied to the payment of the notes; and that Spence afterwards, without the consent of Gilmer, paid to Mrs. Mitchell the sum so agreed to be applied to the payment of this note. By this agreement Spence, the payee of the notes, could have rightfully retained, and it was his duty to retain, the distributive share of Mrs. Mitchell in the estate, and to apply it to the payment of the notes. The payment by him to her, afterwards, was in violation of the agreement made with the surety. The agreement constituted a parol mortgage on the distributive share of Mrs. Mitchell in the estate—Spence being the mortgagee—and his payment to her of this fund, so mortgaged, was a discharge of Gilmer, the surety. By the terms of this agreement, Spence, the administrator, became the trustee for Gilmer, and he could not, without Gilmer's consent, discharge this fund from the payment of the debt, without, in law, discharging Gilmer from liability on the note to the extent of the value of the fund so relinquished.—See *Steele v. Mealing*, 24 Ala. 285; *Toulmin v. Hamilton*, 7 Ala. The agreement, as proposed to be proved, between Mrs. Mitchell, Gilmer and Spence, the administrator, was in law a payment of the notes held by the administrator, if Mrs. Mitchell's distributive share was sufficient to pay it in full, and if not sufficient, it was a payment *pro tanto*.

3. The judgment entry in this case does not disclose anything about sustaining demurrers to any pleas. The pleas in the record show that the evidence sought to be proven by the witness Spence, was relevant and legal evidence, and tended to sustain the pleas on which issue was joined. If it be said that the bill of exceptions shows that demurrers were

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sustained to the special pleas, we say in reply that this court will not look to the bill of exceptions to ascertain what was done with any plea. The judgment entry must show this. If this court can look, and will look, to the bill of exceptions to see what disposition was made of the pleas found in the record, then the court must go further and see whether that disposition was legal. And if it appears from the bill of exceptions that a demurrer was sustained to the pleas, or any of them, then this court will determine whether said demurrer was or not properly sustained. Each of these matters is assigned as error.

2. The authorities before cited abundantly show that the special pleas presented a complete defense to the action. The *general issue* was pleaded and issue joined on it. Under this plea the defense attempted to be proven by the witness Spence, could have been made. Any matter which showed that the plaintiff had no right of recovery at the commencement of the suit, could be proven under the general issue.—See 1 Chitty's Pleading, on pages 477-8-9; *Feagan v. Pearson*, 42 Ala. 339.

W. H. BARNES, *contra*. (No brief came to Reporter.)

BRICKELL, C. J.—1. A presentment of a claim to save the bar of the statute of non-claim, may be made to the executor or administrator, or it may be by filing the claim, or a statement thereof, in the office of the judge of probate granting administration.—Code of 1876, § 2599. It is not necessary whether the one mode or the other of presentment is pursued to present the identical claim. If it is a claim the evidence of which is in writing, as a bill, note, or bond, it is sufficient to state its description with such accuracy, that the executor or administrator will be informed of its character, the liability it imports, and, if there is future litigation as to the fact of presentment, that the claim may be distinguished from all similar claims.—*Hallett & Walker v. Br. Bank Mobile*, 12 Ala. 193; *Posey & Coffee v. Br. Bank Decatur*, Ib. 802.

2. The statement of the claims filed in the office of the probate judge, relied on as a presentment of the notes on which the present action is founded, is very indefinite and uncertain. Except as to the amount, and time of payment of the notes, there is no description by which they may be distinguished from any notes for similar amounts maturing at the same time. It is not shown when the notes were executed, nor to whom they were payable, nor whether they are joint or several obligations. If it was intended as a statement of the notes on which the present action is founded, it omits

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the material part of the notes, that they bear interest from date. While the person making the presentment is shown to be *Sam'l Spence, adm'r*, there is nothing stated from which it can be ascertained of what estate he is administrator, nor whether he or the intestate is the payee of the notes. A presentment which will avoid the bar of the statute must be more than enough merely to excite the inquiry of the personal representative—it must give such information of the existence of the claim, that he may determine—assuming its validity—how far he can proceed safely in the administration of the estate as solvent; and if a mere statement of the claim is relied on as a presentment, that statement should describe the claim with such accuracy that it may be distinguished from all similar claims. Notes for a like amount, falling due at the same time, bearing or not bearing interest, payable to the intestate of Spence, would answer the description in this statement, equally with the notes, the subject of suit, payable to him as administrator; or notes similar in amount, and time of maturity, payable to him as administrator of any other estate than that of James S. Mitchell, would also answer the description in the statement. As a presentment of the notes this statement was insufficient, and the Circuit Court erred in refusing so to instruct the jury.

3. There was other evidence of a presentment, the sufficiency of which it was for the jury to determine. It was conflicting, and the instructions requested by the appellants proceed on the hypothesis, that because of the conflict, the jury would not regard it as sufficient, and to this hypothesis the instructions requested are adapted. A party has a right to instructions based on a hypothesis favorable to him which the evidence tends to support. Such instructions are not objectionable because based on a partial view of the evidence, as his adversary may request contrary instructions, or instructions founded on a contrary hypothesis, so far as the evidence will authorize.—*Griel v. Marks*, 51 Ala. 566.

Let the judgment be reversed and the cause remanded.

[Woodward v. Echols.]

Woodward v. Echols.

Bill in Equity to Enforce Vendor's Lien.

1. *Transfer of purchase-money note; when does not pass equitable lien.*—A transfer by delivery of a promissory note given to the vendor for the purchase-money of lands, if made subsequently to the conveyance of the legal title, does not pass the equitable lien of the vendor.

2. *Same; when operates to pass security for the debt; relation created between the parties.*—Where the transfer of the note was prior to the conveyance of the legal title which remained in the vendor as a security for the purchase-money, the relations of the parties was, in legal effect, that of mortgagor and mortgagee; and, whatever may have been the form of the transfer, the security which was incident to the debt passed by a transfer of the debt—the contrary not being stipulated.

3. *Same; vendor and vendee, no power to impair transferee's security; subsequent conveyance subordinate.*—The vendee, having knowledge of the transfer of the debt before the conveyance to him was executed, it is not within the power of him and the vendor to impair such security after the transfer of the note—the subsequent conveyance is subordinate to the security, and is no obstacle to its enforcement.

4. *Same; effect of taking new note from vendee in lieu of old.*—Where the transferee, subsequent to the conveyance of the legal title, takes, in lieu of the old note, a new note from the vendee, extending the time of payment, the security is not thereby impaired—especially when all intention to waive it is negatived by the recital in the new note of its original consideration.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. N. S. GRAHAM.

Bill was filed by Felix D. Woodward, appellant, against Thomas M. Echols, appellee. The facts are, that appellee purchased from one Henry Norvell a certain tract of land, described in the bill; that he paid about \$600 cash, and gave Norvell his note for the balance—\$800—payable on the 25th of December, 1874; that Norvell executed his deed to Echols, who took possession of the premises; that shortly after said purchase, Norvell transferred said note, before it became due, to appellant for a valuable consideration; that after said note became due, Echols (the vendee) made a payment thereon, and gave a new note to appellant for the balance, payable about the 25th of December, 1875; that on the 10th of February, 1876, Echols made a small payment on said note, and gave another new note to appellant, dated February 10th, 1876, for \$670.50, due and payable December 25th, 1876; that each of said notes described on its face that it was given for the "last payment on said land."

The bill avers that the last mentioned note is due and unpaid, and prays that the same be declared as creating a ven-

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dor's lien on said land, and that a sale be made for its payment, &c.

The Chancellor overruled the demurrer and decreed the complainant not entitled to relief, and dismissed the bill.

The overruling of the demurrer, and the decree, are now assigned as error.

The appellee answered and demurred to the bill.

C. G. RICHARDS, for appellant.

OLIVER & GARRETT, *contra*.

BRICKELL, C. J.—1. The transfer by delivery of the promissory note given to the vendor for the purchase-money of the lands, if it had been made subsequent to the conveyance of the legal title, would not have passed the equitable lien of the vendor.—*Bankhead v. Owen*, at present term; *Hightower v. Rigsby*, 56 Ala. 126.

2. The transfer of the note was, however, prior to the conveyance of the legal title. The legal title remaining in the vendor as a security for the purchase-money, the relation of the parties was, in legal effect, that of mortgagor and mortgagee. The transfer of the note for the purchase-money, whatever may have been its form—whether by delivery or in writing freeing the vendor from responsibility for its ultimate payment—was a transfer of the security for its payment, or rather the security which was incident to the debt, passed by a transfer of the debt, the contrary not being stipulated.

3. The appellee had knowledge of the transfer of the debt, before the conveyance to him was executed. It was not within the power of the vendor and of the appellee, to impair the security for the debt after the transfer to the appellant. The conveyance subsequently made, is subordinate to it, and offers no obstacle to its enforcement.

4. The taking a new note from the appellee, extending the day of payment, did not impair the security, and all intention to waive it is negatived by the recital in the note of its original consideration.—*Conner v. Banks*, 18 Ala. 42; *Boyd v. Beck*, 29 Ala. 703; *Bryant v. Stephens*, 58 Ala. 636.

The decree of the Chancellor is erroneous, and must be reversed, and the cause remanded.

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Terry v. Keaton et al.

Bill in Equity to enforce Vendor's Lien.

1. *Vendor's lien ; what is ; enforceable only in equity.*—A vendor's lien has its existence and can be enforced only in equity. It is rarely the subject of express negotiation or contract, but is an incident which courts of equity recognize and enforce as springing out of the contract of bargain and sale of lands, when attendant conditions do not repel the presumption of such incident.

2. *Same ; conveyance and obligation to convey ; presumption subject to rebuttal.*—The doctrine "that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it and not pay the full consideration money," applies to sales that are consummated by conveyance. When a mere obligation to convey is given, the title is retained as security; but when conveyance itself is executed, lien for the unpaid purchase-money is but an equitable presumption, which may be rebutted.

3. *Same ; what insufficient to prevent lien attaching.*—Where notes were given to secure unpaid purchase-money on land, the absence of an intention to create a lien, without more, does not prevent it from attaching.

4. *Oral testimony to vary written contract*, will not be received, except in a proceeding, with appropriate amendments, which has for its object the reformation of the writing.

5. *Evidence to overturn contract ; when insufficient.*—Where the plain language of certain notes shows that they are contracts for the payment of money for the purchase of certain lands, evidence that "it was not intended said notes should be a lien on the land," is insufficient to release the lien, or overturn the contract, which the law implies.

6. *Lien notes payable to wife of vendor ; suit by wife's administrator.*—Where husband and wife joined in a conveyance of husband's lands for the purchase of which promissory notes were given by the vendees, payable to the wife, who died intestate, before such notes were paid, her administrator may file a bill to enforce the lien created by said notes. The husband had the right to have the notes made payable to his wife, and thus vest their ownership in her, which may be enforced against the vendees, though void against his creditors at the time, if they complain.

7. *Same ; gift by husband to wife.*—A gift by a husband to a wife, such as making payable to her the purchase-money notes for the sale of his land, vests in her only such title as he may resume at any time during his life.

APPEAL from the Chancery Court of Coffee.

Heard before the Hon. HUIOSCO AUSTILL.

The bill in this cause was filed by appellant, Thomas J. Terry, administrator of the estate of Martha A. Johnson, deceased, against Nicholas B. Keaton and wife, appellees, to enforce a vendor's lien on two promissory notes, which the bill alleges to have been made by appellees, payable to appellant's intestate, for the purchase-money of certain lands conveyed by Martha Johnson and her husband, one Ashfield Johnson, to appellees.

The appellees set up in their answer that said Ashfield Johnson and wife, were the father and mother of the defend-

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ant, Martha A. Keaton; that the said Ashfield Johnson owned the lands described in the bill in his own right, and being desirous of having his said daughter settle near him, gave to her said lands and executed his deed therefor, signed by himself and wife—complainant's intestate; that respondents executed said notes and delivered them to said Ashfield Johnson, and they were given to be held only as evidence of an advancement made by said Johnson to his said daughter; that though the notes were made in favor of said Martha Johnson they were never delivered to her, and never became her property; that said Martha Johnson never at any time owned a separate estate; that respondents made no trade with her in regard to said lands; that it was expressly agreed and understood that said notes were not to be paid and were not to be a lien upon said lands.

The case and points raised may be understood from the following opinion and decree of the Chancellor, and assignments of error:

"There are numerous objections to testimony in this cause, which the court deems it unnecessary to notice in detail. The parties to the suit are incompetent to testify as to any business transactions with, or statements by, complainant's intestate. The spirit of the statute excludes the testimony of any party personally interested in the subject matter of the suit, when objection is made to his testimony. When, however, a party is called upon to testify against his interest by the party adversely interested, the court is of opinion that his testimony should be received. The objections to Ashfield Johnson as a witness overruled, and his testimony is considered. The court is of opinion that, even if complainant's intestate was the owner of the notes, no vendor's lien attached to them in her hands. Having no lien the complainant has no remedy in this court."

The bill was dismissed without prejudice to complainant's right to sue at law upon the notes.

The errors assigned are:

1. Overruling appellant's objections to depositions of W. B. Keaton, Martha A. Keaton, and Ashfield Johnson.
2. Overruling exceptions to testimony offered by appellees.
3. Holding that no lien attached to the notes.
4. In not decreeing in favor of appellant.
5. In dismissing the bill.
6. The final decree.

W. D. ROBERTS, for appellant.—1. The defendants, W. B. Keaton and Martha A. Keaton, are incompetent witnesses to

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prove any transaction with, or statement made by, complainant's intestate.—*Key et al. v. Jones' Adm'r*, 52 Ala. 238; *Louis, adm'r v. Euslen*, 50 Ala. 470; *Waldman v. Crommelin's Adm'r*, 46 Ala. 580; *Stalling's Adm'r v. Hinson*, 49 Ala. 92.

2. A party cannot, when testifying for himself, be permitted to state the intention with which he entered into the contract.—*Oxford Iron Co. v. Spradley*, 51 Ala. 171.

3. Oral evidence is incompetent to vary or change a written contract, or to show a different consideration to the one expressed on the face of the instrument, unless the party is the actor, in a court of chancery, to reform the instrument.—*Steamboat Belfast v. Boon & Co.* 41 Ala. 50; *Hoyne et al. v. Smith, et al.* 16 Ala. 600; *Clark v. Hart*, 49 Ala. 86; *Chappell v. Williamson et al.* 49 Ala. 153; *Murphy v. Br. Bank of Mobile*, 16 Ala. 90; *Cowles v. Townsend & Milliken*, 31 Ala. 133; *Litchfield v. Falconer*, 2 Ala. 280.

4. The subscribing witness to the deed is supposed to know the terms of the contract better than the parties themselves.—*Bennett v. Robinson*, 3 S. & O. 227; see opinion on page 232.

5. A party cannot show by parol evidence that a note is not to be paid by an agreement not incorporated in the note.—*Walker v. Clay & Clay*, 21 Ala. 797; *West & West v. Kelly's Ex'r*, 19 Ala. 353.

B. M. STEVENS, with whom was J. E. P. FLOURNOY, *contra*.—

1. The first assignment of error is not well taken, as the pleadings and proof show that the land trade was not a transaction by or with Martha A. Johnson, appellant's intestate, but was a transaction with Ashfield Johnson, her husband, who is now in life.

2. The second assignment of error is not well taken. Ashfield Johnson being the husband of Martha A. Johnson, appellant's intestate would be entitled to one moiety of her personal estate absolutely, and being called by appellees to testify against his own interest, was, therefore, competent; and, with said Johnson not being a party to the cause, was, in all respects, competent to testify therein generally.

3. The third assignment of error is not well taken, as the proof overwhelmingly shows that it was expressly agreed and understood, at the time of said transaction, that said notes were not to be a lien upon said lands.

4. The fourth, fifth and sixth assignments of error being general, are also not well taken, as shown by the preponderance of proof in favor of the decree of the learned Chancellor, in the court below.

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STONE, J.—1-2. In the case of *Bankhead v. Owen*, MSS., Ch. J. BRICKELL entered so fully into the discussion of the nature and extent of the equitable doctrine of vendor's lien, that we consider it unnecessary to repeat what he has so well said. It has its existence, and can be enforced only in equity. It is rarely the subject of express negotiation or contract, but is an incident which courts of equity recognize and enforce, as springing out of the contract of bargain and sale of lands, when attendant conditions do not repel the presumption of such incident. Its principle is, "that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not pay the full consideration money."—2 Sto. Eq. Ju. § 1219. This doctrine applies to sales that are consummated by conveyance. When a mere obligation to convey is given, the title is retained as security. But when conveyance itself is executed, lien on the land for unpaid purchase-money is but an equitable presumption, which may be rebutted.—*Foster v. Athenaeum*, 3 Ala. 302; *Conner v. Banks*, 18 Ala. 42; *Day v. Priskett*, 40 Ala. 624. *Relfe v. Relfe*, 34 Ala. 500; *Bowers v. Taylor*, 23 Ala. 255; *Brooks v. Woods*, 40 Ala. 538. See, also, *Buford v. McCormick*, 57 Ala. 428.

3. It is pleaded in defense to this suit that in this case the vendor's lien was waived. The testimony in support of this defense is that of Ashfield Johnson, Martha A. Keaton and Nicholas B. Keaton, and is entirely oral. We need not inquire whether such testimony would, in any case, be sufficient to repel the implication of lien. The testimony is wholly insufficient. The witnesses say, "it was not intended said notes should be a lien on the land." This is, in substance, the sum of the evidence. It is wholly insufficient to prove a contract releasing the lien which the law implies. Parties may have supposed the notes would be paid, and may not have thought of the question of lien. The absence of an *intention* to create a lien, without more, does not prevent it from attaching. Courts pronounce on contracts of parties; not on their uncommunicated intentions, or thoughts not embodied in mutual agreements.—*Sunford v. Howard*, 29 Ala. 684.

4-5. It is contended, however, that the conveyance of the land was intended as advancement, and that the notes were never to be collected. We think the proof given on this subject falls within the rule, applicable alike to cases at law and in chancery, that oral testimony will not be allowed to vary the terms of a written contract, except in a proceeding, with appropriate averments, which has for its object the reformation of the writing.—*Hogan v. Smith*, 16 Ala. 600;

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Steamboat Belfast v. Boon, 41 Ala. 50; *Clark v. Hart*, 54 Ala. 490; s. c. 57 Ala. 390. Aside from this, we think the proof in this case fails to overturn the plain language of the notes, that they are contracts for the payment of money.—See, also, *West v. Kelly*, 19 Ala. 353; *Walker v. Clay*, 21 Ala. 797.

6. It is further contended that inasmuch as the lands which were sold and conveyed were the property of Mr. Johnson, and not of Mrs. Johnson, the intestate, the present suit can not be maintained by her administrator. *Buford v. McCormick* answers our phase of this objection. The other—namely, the right of Mr. Johnson to have the notes made payable to his wife, and thus vest their ownership in her, while void against his creditors at the time, if they exist and were complaining, is settled against the defendants by several decisions of this court.—See *Jones v. Deyer*, 16 Ala. 221; *Williams v. Maull*, 20 Ala. 721; *Andrews v. Andrews*, 28 Ala. 432; *Pinkston v. McLemore*, 31 Ala. 308; *Cain v. Gimon*, 36 Ala. 168.

7. There is a remark in the case of *Gunnard v. Eslava*, 20 Ala. 732,—not necessary to the decision—which asserts that a gift by husband to his wife, such as that shown in this record, vests in her only such title as he may resume at any time during his life. The authorities cited are *Adams v. Brackett*, 5 Metc. (Mass.) 280, and *In re Grant*, 2 Sto. 312. While they support another well recognized principle expressed in the same paragraph, they make no allusion whatever to the right of the husband to make such gift or settlement.

The decree of the chancellor is reversed, and this court, proceeding to render the decree which that court should have rendered, doth order and decree that the complainant is entitled to the relief prayed by his bill. It is referred to the register to take and state an account of the amount due complainant, with proper interest computed, and report the same to the next term of the Chancery Court. All other questions are reserved until the coming in of the report.

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*Action by Administratrix to Recover Damages for the Killing
of her intestate.*

1. *Railroad company; negligence by.*--Where a train of cars was moving backwards, within the limits of an incorporated town, while the deceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a look out, and the cars ran over and killed the deceased, the company is guilty of negligence.

2. *Act to prevent homicides, omitted from Code; subsequent act to supply omission; remedy against corporations for acts causing death.*--The act approved February 21, 1860, entitled, "an act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted; and the act of the same title, approved February 21st, 1872, having been passed to remedy the omission; section 1941, (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death, which said sections 1938, 1939, gave against individuals, now gives the same remedy as by the amending act of 1872.

3. *Contributory negligence; defensive matter; burden of proof.*--In an action to recover damages for a wrongful act causing death, contributory negligence on the part of the deceased is defensive matter, and the burden of proving it rests on the defendant, unless the plaintiff's own testimony inculpates the deceased.

4. *Charge as to affirmative and negative testimony; when properly refused.*--A charge which asserts that "where one man swears positively that he saw or heard a certain thing, and any number of witnesses swear that they did not see or hear it, then the witness swearing affirmatively that he saw or heard it, outweighs the others," is properly refused, because not confined to witnesses equally credible and having equal means of knowledge.

5. *Punitive damages under statute; to what extent recoverable.*--The damages allowed by the statute which gives an action for a wrongful act causing death, are punitive, and are not confined to the pecuniary loss sustained by the family of the deceased by reason of his death.

APPEAL from City Court of Lee.

Tried before the Hon. JOHN M. CHILTON.

This was a suit to recover damages for the death of plaintiff's (appellee's) intestate, who was run over and killed by defendant's (appellant's) train in Opelika.

Complaint was framed in reference to section 2297 and 2300 of Revised Code, and act of February 5, 1872, p. 83. The first count claims \$25,000, for that on 10th November, 1873, deceased was on the track of defendant's railroad (described as a corporation in the margin) in the city of Opelika. "The defendant so negligently conducted itself in the management of a locomotive belonging to it" as to cause it to

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pass rapidly over its track without care and diligence, (and for want of these characteristics), said locomotive and cars attacked, struck and killed deceased; that deceased would have maintained action had the wounds failed to produce death. The second count is the same, except it claimed only \$3,000, and alleged that deceased was where he might lawfully be, and left a widow, and his income was \$1,200 per annum. The third count is the same, except it avers that *servants and employees* did negligently conduct themselves, &c.

About twenty-four grounds of demurrer are assigned, but only the following points of law are apparently insisted on: 1. Plaintiff should state absence of negligence on the part of his intestate. 2. That deceased merely being upon the track should prevent recovery. 3. That the acts of negligence should be stated more particularly. 4. The Code, § 2298, confines recovery to \$3,000; and act of 71-2, p. 83, is not applicable. 5. Complaint should allege that the injury was caused by act of *officer, agent or employee*. 6. That description of defendant, in margin, is not sufficient. The plaintiff had leave to amend so as to describe defendant in the body of the complaint—and the demurrers were overruled.

Defendant pleaded that negligence of plaintiff contributed to the injury—and, not guilty.

Plaintiff's witness, O. H. Lockett, swore—that he saw defendant's train running backward at the rate of 15 miles an hour, until it passed deceased; ran to the track and found deceased dying; the engine bell was not rung or whistle blown. Three other witnesses sustained Lockett. It was also proved that deceased was walking from the train, and was in full view for 400 yards. No rule of defendant regulated the speed of their trains, and no lookout was required to be kept in the direction trains were moving, and no employee or agent of the company was actually so situated as to see in the direction this train was moving. A *flying switch* was being made when deceased was killed. The value of services of deceased were estimated at from \$16 per month to nothing.

Defendant's witnesses (its employees) swore that the bell was ringing. The train consisted of two passenger, two flat, and three freight cars. Plaintiff, in examining the witness Lockett, asked him "if he saw any watchman on the top of the train?" and to this defendant excepted. The charges given were as follows:

By the court: "1. Under the Code a recovery could not exceed \$3,000; but under act of 1872, they were not limited in amount, and if they found for plaintiff, might assess such

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amount as they deemed just under all the circumstances of the case."

At the instance of plaintiff: "2. When the law casts upon a party the burden of proving a fact, it is to be regarded, for the purposes of the trial, that the fact does not exist where there is no evidence tending to prove it. The law casts upon the defendant the burden of proving any negligence of the deceased."

The following charges were refused: 1. If defendant's agents rang the bell at the crossing, as required by statute, there was no negligence on the part of defendant, and deceased being on the track and not looking for the train, was such want of care and common prudence as would defeat a recovery.

2. There is no law in Alabama that requires railroad companies to keep watchmen on top of trains, or any where else, as the train is running, and they can not be found liable in this action for not doing so.

3. Affirmative is to be relied on in preference to negative evidence, and when one man swears positively that he heard or saw a thing, and any number of witnesses swear that they did not see or hear it, then the one swearing affirmatively shall outweigh the number who swear negatively.

4. The measure of damages in this case, is what the jury may find was the reasonable pecuniary loss occasioned by the death of deceased, and the law does not allow them to find any damage for wounded feeling or solace of mind of different members of the family, and if there was no pecuniary loss to the family by his death, then none should be found, and the verdict should be for defendant.

5. This is an action to recover money damage for pecuniary loss, and unless the death of deceased caused pecuniary loss they can not find for plaintiff.

6. In estimating damage, the jury will consider the age, health and occupation of deceased, and the comfort and support afforded to his family, and confine themselves to the actual and such other damage as would afford the family of deceased the same support they would have obtained from his labor during the time he would probably have lived; that in such cases the law looks only to such damage as can be reduced to a pecuniary standard, and they should only find such pecuniary damage as they deem just.

The following assignments of error are made: 1st. Overruling the demurrers. 2d. Permitting witness Lockett to testify that the railroad company kept no one on top of the cars as a lookout. 3d. In letting said testimony of Lockett go to the jury. 4th. In giving the charges excepted to by

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appellant. 5th. In refusing the charges asked by appellant.

W. H. BARNES, for appellant.—1. The act of 1871-2, page 83 of Pamphlet Acts, does not apply to corporations. The second section shows that it was not intended to apply to corporations. It provides that the cause of action should survive against the representative of the deceased. Besides, if the act could be made to apply to corporations, it would be violative of the 2d section of the 4th article of the constitution of 1868.

2. The objection to this act, is raised both by the demurrer to the first count as well as to the exception to the charge of the court, which asserts, in its instruction to the jury, that as the law now stands, under the act of 1871-2 they are not limited, but may give such damages as they may deem just under all the circumstances. This charge was also subject to the further objection, that it authorizes the jury to find beyond a pecuniary compensation. We contend that the standard, or measure of damages, is to compensate in money the loss as a pecuniary compensation only, and not vindictive in their nature; that there can be no recovery for grief of mind, or solace of the wounded feelings of any or all the family.—*Illinois Cen. R. R. v. Martin Wildon*, 52 Ill. 294; *Elihu Corndust v. A. Grifferdamy*, 48 Ill. 410; *Chicago & Rock Island Railroad v. S. Morris' Adm'r*, 26 Ill. 400; *Penn. R. R. Co. v. Butler*, 57 Penn. 335; Sedgwick on Measure of Damages, 6th ed. pp. 625, 695-6, head-notes and authorities.

3. The demurrer should have been sustained to the first count—in fact to all the counts, because they showed on their face that the deceased was on the track of the railroad, not at a public crossing, which the law pronounces negligence in itself.—*Sherman & Redfield on Negligence*, p. 572; *Phil. & Reading Railroad Co. v. Hamell*, 44 Penn. St. 375.

4. The charges given by the court, at the request of the plaintiff, which asserted that the burden was on the defendant to prove that the deceased was guilty of negligence—we maintain that the law is, that the plaintiff must show, by the proof, that he was on the track without any negligence on his part.—*Ann Curran, Adm'r, v. Worm, &c.*, 36 N. Y. 153.

5. The charge asked by the defendant, on the effect of the affirmative and negative evidence, under the facts of this case, asserted a correct legal proposition, and should have been given.

6. The appellee in this case contends that there was negligence in the railroad company in not prescribing the rate of speed that the road should run its cars through the city of Opelika. There is no statute of the State requiring such a

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regulation, and there was no ordinance of the city of Opelika requiring them to do so; consequently, there could be no negligence charged on the road because it did not do so.

7. The declaration should have contained an averment that the deceased left a widow, or next of kin, surviving him. It might be possible that there was no one to take his estate, and as there was no one, no action could be sustained.—*Chicago & Rock Island R. R. Co. v. Samuel Morris, Adm'r*, 26 Ill. 400.

8. The appellee contended, in the argument that, if the plaintiff was held to the Code, and the act of 1871-2 did not apply, although the jury should find more than they had a right to recover, it would not avail the defendant below. This proposition is most certainly untenable. The court cannot make a verdict for the jury. It cannot reduce their finding, and, most especially, after charging them that, as the law now stands, they are not limited in amount, but might find any amount they should, or might deem just.

G. D. & G. W. HOOVER, *contra*.—1. It was unnecessary for plaintiff to state absence of negligence on the part of deceased.—*Johnson v. Hudson River R. R.* 5 Duer, 21; *Gough v. Bryan*, 2d Mees. & Welsb, 790; *Bridge v. Grand Junc. R. R.* 3d M. & W. 244; *Davis v. Mann*, 10 M. & W. 546; *R. R. Co. v. Gladmon*, 15 Wallace, 401. These authorities show that negligence of plaintiff contributing to his injury, is a defense to be proved and pleaded by defendant. A defendant cannot invoke this rule who fails to use ordinary care, when that degree of care might have prevented the act causing injury.—*Steamboat Farmer v. McCraw*, 26 Ala. 189; *Grant v. Mosely*, 29 Ala. 302, 1st Brickell, 40. See, also, *Hanlon v. R. R. Co.* at present term.

2. The mere fact of plaintiff being upon the track does not show such degree of negligence as would defeat a recovery. *Steamboat Co. v. McCraw*, 26 Ala. 189; *R. R. Co. v. Gladmon*, 15 Wallace, 401; *Johnson v. Hudson River R. R. Co.* 20 N. Y. 65; *Chicago, &c. R. R. v. Merrin*, 58 Ill. 300; *Foster v. Holly*, 38 Ala. 76; *Ill. &c. R. R. v. Brokes*, 55 Ill. 379; *Greenland v. Chaplin*, 5 Ex. R. (M. H. & G.) 243. "Negligence is ordinarily a question for the jury."—*Foster v. Holly*, 38 Ala. 76, 84. The only exception to this rule seems to be, where the facts admit of no inference opposed to the conclusion that the party was guilty of negligence.—*Hibber v. McCartney*, 31 Ala. 501.

3. "The allegation that the injury happened in consequence of the negligence of the defendant, implies that there

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was no negligence, on the part of the plaintiff, to it."—*Govt. St. R. R. v. Hanlon*, 53 Ala. 70.

4. The acts of negligence, on the part of defendant, are stated with sufficient particularity.—*Foster v. Holly*, and other authorities cited.

5. The act of 1871-2, p. 83, provides, "when the death of a person is caused by the wrongful act, or omission of another," &c. Now, the term "person" and "another" embrace corporations as well as natural persons.—See Revised Code, § 1; *People v. Utica Ins. Co.* 15 Johns. R. 358; *Ontario Bank v. Bunnell*, 10 Wend. 186; *Assurance Society v. Commissioners*, 28 Barb. 318; 5 Abb. N. Y. Dig. 89, § 146, and cases above cited. In 1853, Rhode Island enacted a statute, the 21st section of which is quoted in *Steamboat Co. v. Chace*, 16 Wallace, 530, in almost the identical words of the act of 1871-2, above quoted.

6. A corporation can commit the homicide referred to in the act of 1871-2.—4 Black. Com. 177; 1 Bouv. L. D. 589. The words of the act show it was intended to prevent homicide in its most extensive sense.

7. It is not necessary to allege that the injury was caused by act or omission of officer, agent, or employee. A corporation being unable to act or omit, except by officers, employees, or agents, the allegation that the act was done by the corporation was equivalent to the allegation that it was done by an officer, agent, or employee.

8. The description of defendant in the margin of complaint was sufficient.—Code, 673; *Graham v. Gunn, Adm'r*, 45 Ala. 577; *Crimm v. Crawford*, 29 Ala. 623; *Montgomery v. Barbour*, 45 Ala. 277; *R. R. Co. v. Comons*, 45 Ala. 437; *R. R. Co. v. Thomas*, 42 Ala. 672; *Ware v. Bagging Co.* 47 Ala. 673; *Plow Co. v. Eslava*, 47 Ala. 384; 2 Brick. 344-5, sec. 241-2-3. In this case, leave was obtained to amend, and the amendment will be presumed to have been made.

9. The defendant assigned no ground for his objection to the question to Lockett as to a watchman being on the train, hence it was not error to overrule it.—*Wallace v. Rhea & Ross*, 10 Ala. 451; *Thompson v. Lee*, 31 Ala. 292. But the evidence was legal.

10. In *R. R. Co. v. Gladmon*, 15 Wallace, 401, the mere fact that a driver of a street car momentarily turned his head so as to look at right angles to the course in which he was driving, was sufficient to establish negligence. There horses were used and the rate of speed not proven to be greater than a foot passenger. Here steam is used, and a rate of speed from five to fifteen miles an hour.—*Chicago, &c. R. W. v. Gregory*, 38 Ill. 300.

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11. The jury were not limited in amount of verdict, and are not confined to actual pecuniary damage sustained by family of deceased.—Note, first, the words of the act of 1871-2, p. 83; *Oldfield v. N. Y. & Harlem R. R.* 14 N. Y. 310—a decision or statute same as ours; 6 Abb. N. Y. D. 180, §§ 9-10-11-12-13-14; *S. C. v. 42 & Grand St. R. R.* 47 N. Y. 317.

12. The ruling upon the charges was proper.

STONE, J.—1. The following facts are undisputed: The defendant, corporation, was backing its train, pushing passenger and box freight-cars ahead of the engine, so that no person on the engine could see ahead of the train; there was no brakeman or other person on the boxes, or stationed elsewhere, to keep a lookout ahead; this was within the limits of the city of Opelika; and the plaintiff's intestate, walking on the track, in the direction the train was moving, was overtaken by the train, run over, and killed. Under the principles declared in the case of *Tanner v. Louisville & Nashville Railroad Company*, at this term, we hold this fixes the charge of negligence on the railroad company.—*Ballo. & O. R. R. Co. v. Daugherty*, 36 Md. 366; *Brown v. A. & St. Jo. R. R. Co.* 50 Mo. 461, 467; *C. B. & Q. R. R. Co. v. Triplett*, 38 Ill. 483; *Beisiegel v. N. Y. Cent. R. R.* 34 N. Y. 622.

2. It is objected for appellant that the act "To prevent homicides," approved Feb. 5, 1872, Pamph. Acts 83, relates only to homicides by natural persons, and does not authorize an action against a corporation. Sections 2297, 2298, and 2300 of the Revised Code, are reprints of sections 1938, 1939 and 1941 of the Code of 1852. The act "To prevent homicides," approved Feb. 21, 1860, Pamph. Acts 1859-60, page 42, had expressly repealed sections 1938-9 of the Code, and enacted in their stead the following: "That in place of the sections of the Code hereby repealed, the following words be inserted, 'That, when the death of a person is unlawfully caused by another, the personal representative of the deceased may maintain an action against the latter at any time within two years thereafter, and may recover such sum as the jury deem just, and the amount so recovered, shall be distributed as personal property of an intestate is now distributed, and shall not be subject to the payment of the debts of the deceased. That the right of action hereby given shall survive against the personal representative of the person unlawfully causing the death as aforesaid.'" This statute, it will be observed, while it repealed, in express terms, sections 1938-9 of the Code of 1852, left section 1941 unrepealed. It is thus shown that the act of 1860, copied above, was ex-

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pressly made applicable to homicides caused by the "wrongful act, omission, or culpable negligence of any officer or agent of any chartered company," &c., as well as to deaths caused by natural persons. If the provisions of that statute had been carried into the Revised Code as sections 2297-8, as they should have been, no one will question that they would have received such construction, and that the act "To prevent homicides," approved Feb. 5, 1872, would have been unnecessary, and would not have been enacted.—See Pamph. Acts 1871-2, page 83. But the author of the Revised Code overlooked and omitted the act of Feb. 21, 1860, and retained the repealed sections as 2297 (1938) and 2298 (1939). To remedy this oversight in the codifier, and to restore the statute thus omitted by him, the legislature, at the session of 1871-2, re-enacted the statute "To prevent homicides," with the same title, and, in all material respects, in language identical with that employed in the act of Feb. 21, 1860.—Pamph. Acts, 83. This statute repealed, by implication, sections 2297 (1938) and 2298 (1939) of the Revised Code. It did not conflict with section 2300 (1941), and hence did not repeal it. That section still stands. Section 2300, Revised Code, was evidently placed there, out of abundant caution, and to prevent misconstruction. It is relational and explanatory. It was not necessary; for "the word 'person' includes a corporation, as well as a natural person."—Code of Alabama, § 1. The laborious authors of the Code of Alabama, in place of sections 2297-8 of the Revised Code, have substituted the provisions of the act approved Feb. 5, 1872, and numbered it section 2641. In this, they simply expressed what every one must admit, that the later statute, being repugnant, repealed those sections. But there was no repugnancy between the later statute and section 2300, and it did not repeal that. They retained section 2300, and numbered it 2643. Being relational, it could relate to nothing except the preceding sections 2641-2, and they so placed it. In this they but carved out what we are convinced was the intention of the legislature. We hold, then, that the action authorized by the act of Feb. 5, 1872—Code of Ala. § 2641—may be prosecuted against corporations which, by their employes or agents, offend its provisions.—*Southwestern R. R. Co. v. Paulk*, 24 Geo. 356; *LaFarge v. Exch. Fire Ins. Co.* 22 N. Y. 352; *People v. Utica Ins. Co.* 15 Johns. 358; Comp. 73.

3. What we have stated above, shows that the City Court did not err in its rulings on the demurrers, or in the introduction of evidence.—See *Govt. Street Railroad v. Hanlon*, 53 Ala. 70. Neither did the court err in holding that want of care in plaintiff's intestate, contributory to the injury com-

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plained of, was defensive matter, to be made out by defendant.—Ib. Charges two and three, given at the instance of plaintiff, are, possibly, a little too strong. Contributory negligence, when it exists, most generally springs out of the facts and circumstances which prove the injury. Hence, we can not say that, as matter of law, the onus of proving it rests on the defendant. It evidently rests on the defendant, unless the testimony which seeks to fix blame on the defendant, also inculpates the plaintiff. This, however, was a subject for an explanatory charge, if deemed material; and, as we think no injury resulted from it, it furnishes no ground of reversal.

4. The defendant asked several charges, which were refused. Charge three relates to positive and negative evidence. It was rightly refused, because it did not predicate that the witnesses should have equal means of knowledge, and be equally credible.—Sharswood's Starkie's Ev. 867, in margin; *Pool v. Devens*, 30 Ala. 672.

5. Charge four fixes an erroneous measure of damages, and was rightly refused on that account, although in other respects it may have asserted correct legal principles. Lacerated feelings of surviving relations, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the act of Feb. 5, 1872. Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury "deem just." The damages are punitive, and they are none the less so, in consequence of the direction the statute gives to the damages when recovered. They are assessed against the railroad "to prevent homicides."

The other charges asked are in conflict with our views above, and were rightly refused.

Judgment of the City Court affirmed.

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ACCORD AND SATISFACTION.

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2. *Same; satisfaction by one trespasser as affecting others.*—A release to one joint trespasser, or acceptance of satisfaction from one, discharges all; but an acceptance of partial satisfaction from one, and a receipt or release to that extent, (having effect according to the intention of the parties, Rev. Code, § 2685), is only available to the other defendants as partial satisfaction.—*Id.*

ACCOUNT.

1. *Bill for account; when without equity because account adjustable at law.*—A. and W. were judgment creditors of V. for unequal amounts, having the same attorney through whom the judgments were compromised for an aggregate sum, which was to be applied to the judgments in proportion to their respective amounts. W. had received more than he was entitled to, and the attorney had a sum on hand which he was willing to pay to the party entitled to it. A. filed a bill praying a decree declaring her entitled to the money on hand, and for a decree against W. for the excess received by him above his proportion of the aggregate amount of the compromise.—*held*, that the bill was without equity; the demand being purely legal, its amount ascertainable by simple calculation, and the remedy at law adequate.—*Avery, adm'r v. Ware, et al.* 475.
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ACTION.

1. *Action; what does not survive, and can not be enforced by attachment.*—The personal representative can not institute or maintain any action to recover damages for an assault and battery upon the decedent in his life-time; such a cause of action does not survive, and attachment will not lie at the suit of the administrator to enforce it; nor can such attachment, at the suit of the personal representative, be maintained under the "act to prevent homicides," approved February 5th, 1872—the assault and battery not being shown to be the wrongful act of defendant, causing death; nor can such proceeding be amended so as to make it conform to that statute.—*Hadley et al. v. Bryer's Adm'r*, 185.
2. *Discontinuance; what does not operate as.*—Where suit is brought in the name of two persons, claiming, as late partners, under a firm name for goods sold defendant—there being nothing to show that the plaintiffs had different interests in the debt—the suit, on the death of one of the plaintiffs, should be prosecuted in the name of the other as surviving

ACTION—*Continued.*

- partner; making the executor of one of the deceased partners a plaintiff with the other, creates a misjoinder of parties plaintiff, for which a demurrer would lie, but does not operate a discontinuance; neither is the cause discontinued by amendment striking out the name of the other partner, and leaving the executor of the deceased partner the sole plaintiff.—*Davidson v. Weems' Ex'r*, 187.
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 6. *Compromise; money paid on; when can not be recovered back.*—Money paid in compromise of a doubtful or disputed claim, can not be recovered back by action for money had and received. Thus, where a judgment creditor, having an execution levied on his debtor's land, in May, 1870 (after the decision of *Hepburn v. Griswold*, 8 Wall. 603, which held the legal tender acts of Congress not applicable to existing contracts), instructed the clerk and sheriff to receive nothing but gold and silver, or its equivalent, in satisfaction of the debt, and refused to receive legal tender notes except at 15 per cent. discount, which was then the premium on gold, and which the defendant refused to pay, but offered to pay them at 10 per cent. discount, which offer the plaintiff finally accepted. *Held*, that the premium paid could not be recovered, after the overruling of *Hepburn v. Griswold, supra.*—*Troy, adm'r v. Bland*, 197.
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AMENDMENT.

1. *Amendment; what properly allowed.*—A complaint may be amended by adding new parties plaintiff, and striking out the names of others, so long as there is not an entire change of parties.—*Berry et al. v. Ferguson et al.* 314.
2. *Same; when allowable.*—The statute of amendments is very broad and comprehends all pleadings except indictments (R. C. § 2657), and will authorize an amendment of the information, which, though quasi criminal, is the act of the relator as essentially as is the complaint in a civil action.—*Thomas v. The State ex rel. Stepney*, 365.
3. *Amendment of complaint; what allowable.*—In a suit against a probate judge to recover the statutory penalty for issuing a marriage license illegally, the complaint may be amended, under sections 3155-6-7 of the Code of 1876, by an alteration of the mere descriptive names of the persons to whom the license was issued; such alteration does not constitute a change of the parties, nor a change of the form of action.—*Mitchell v. Davis*, 615.
4. *Same; when properly disallowed.*—When an amended complaint fails to present a cause of action not fully covered by the original complaint, the refusal of the court to allow the amendment can not work injustice, and hence is not error.—*Smith v. Fellows' Adm'r.* 467.
5. *Amendment; when will not be presumed.*—The appellate court will not presume that an amendment of pleadings, shown to be necessary by the proof, was made, when the party omits to ask leave to amend, after the defect has been brought to his notice, by objection raised in the court below.—*Davidson v. Weem's Ex'r.* 187.

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ASSIGNMENT. See FRAUDULENT CONVEYANCES.

1. *Assignments for the security of creditors; Code construed.*—The Code declares that all assignments, or other conveyances stipulating for the release of the debtor, fraudulent and void as to creditors of the grantor; general assignments are not prohibited, but preferences created by them are annulled, and they are converted into a security for the equal benefit of all creditors. With these exceptions, the Code wrought no changes in the principles settled by judicial decisions touching assignments, or other conveyances for the security of creditors. It has not entirely destroyed the right of an insolvent debtor to prefer one creditor to another.—*Perry Ins. & Trust Co. v. Foster*, 502.
2. *Same; when not declared fraudulent; provision as to sale.*—An assignment conveying a plantation, and crops thereon, requiring trustees to take possession and sell, will not be declared fraudulent, because it does not provide for the immediate sale of property conveyed. The sale must be made in a reasonable time, and the reasonableness for any delay for which the assignment provides, must depend on the character of the property, the cause of delay, and the circumstances of the particular case.—*Id.*
3. *Same; what not an unreasonable stipulation.*—Where, in the spring of the year, an assignment is made of a plantation, and the personal property used in cultivating crops upon it,—at which season it could not be easily rented, and it would be sacrificed by a sale, and necessarily abandoned if stripped of the personal property—it is not unreasonable to stipulate that a sale shall be delayed until the first day of December following; and, in the meantime, that the property shall remain in the possession of the grantors, to be used in making the crops which are to be delivered to the grantee as soon as gathered, and applied to the payment of the secured debts.—*Id.*
4. *Transfer constituting general assignments under our statutes.*—A transfer, without regard to its former conveyance, by the voluntary act of an insolvent or failing debtor, of substantially all of his estate subject to execution, for the security of one or more creditors in preference to the others, is, under our statutes, a general assignment which enures to the equal benefit of all creditors. To come within the influence of the statute, the disposition of substantially all of the debtor's estate to one or more creditors, in preference to the others, must be by volition or act of the debtor; the statute has no reference to preference or liens arising by operation of law.—*Id.*
5. *What will vitiate an assignment; and what not.*—The wilful, deliberate introduction of fictitious debts, or the intentional exaggeration of the amount of real debts, in which debtor and creditor participate, is feigning a consideration, and is a fraud which will vitiate an assignment; but error in the description of debts, or the introduction of fictitious debts, to which the creditor is not privy, will not vitiate an assignment, nor will an assignment be vitiated merely because the creditor has other security for any one or more of the debts, which security is not stated in the assignment.—*Id.*
6. *Same; what not a simulation or exaggeration of debts which will vitiate a conveyance.*—When a creditor takes from his debtor a conveyance to secure his acceptances of the debtor's bill of exchange, as well as other debts, and at the same time receives a transfer from third persons of judgments in their favor against the debtor, for a like amount, which was purchased with the bill, and such is not expressly mentioned in the conveyance, it is neither a simulation nor exaggeration of debts which will vitiate the conveyance. The conveyance does not secure the judgment, and the debt, evidenced by the bill of exchange, is still an outstanding liability, unless the acceptor and debtor intended the transfer of the judgment to operate as payment of it, and this presumption is repelled when it is expressly stipulated in the conveyance that it shall not operate to impair the right of the holder or transferee of any judgment against the debtor, to enforce it at pleasure.—*Id.*
7. *Conveyance in this case held valid.*—The conveyance, under the facts set

ASSIGNMENT—Continued.

- out in this case, was valid, and could neither be set aside as fraudulent, nor declared a general assignment.—*Ib.* 503.
8. *Assignees of notes given for land; what determines priority of payment.*—Where the purchaser of lands executes several promissory notes for the purchase-money, falling due at different times, and secured by mortgage, or other instrument creating a lien on the lands for their payment, an assignment of the notes is an assignment *pro tanto* of the security for their payment, in the absence of an express stipulation to the contrary; and the several assignees are entitled to priority of payment, according to the date of their respective assignments, without regard to the time when the notes severally matured.—*Ala. Gold Life Ins. Co. v. Hall*, 1.
 9. *Same.*—In such case, five of the notes being payable, one, two, and three months after date, and eleven payable five years after date, with interest payable semi-annually; while the power of attorney to the vendor containing the power of sale, authorized him "to sell and convey the real estate, or so much thereof as may be necessary, upon default in payment of said notes or either of them, or the interest due thereon, as aforesaid;" and further provided that "in case he shall have negotiated any of said notes before their maturity, so that some other persons may be the lawful holder thereof, then said lawful holder of said note or notes may execute all the powers herein conferred on said" [vendor] "so far as they may apply to such note or notes held by such person, and in case of the death of said vendor, his executors or administrators may execute all the powers herein conferred, so far as they may apply to any of said notes remaining assets of his estate; and the said person conducting said sale or sales shall, from the proceeds of sale, first pay the expenses of sale, then the interest and principal on the notes then due in the order of maturity, rendering the surplus, if any, to the said" purchaser: *held*, that these stipulations did not change the principle above stated so far as regards the notes last falling due.—*Ib.*
 10. *Liability of maker of promissory note to assignee; estoppel.*—If a promissory note, or other evidence of debt, is purchased on the faith of a promise by the maker to pay it, he will be compelled, at all events, to pay the assignee, and is estopped from asserting the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known at the time of such promise, or of a subsequent failure of consideration. And the same rule applies if the promisor had previously accepted an order to pay the debt, or any part of it, to another.—*Auerbach et al. v. Pritchett*, 451.
 11. *Assignment of policy; when not void.*—Where a policy was issued on the life of a debtor for the benefit of a firm, as his creditors, and provided that it should not be transferred without the approval of the company, a transfer by one partner, of his interest, to another partner, will not avoid the policy nor defeat the transferee's right of action thereon, especially where, by the death of the transferring partner, the legal title is cast on the plaintiff as surviving partner.—*Piedmont & Arlington Life Ins. Co. v. Young*, 476.
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 13. *Assignee of mortgage debt, when necessary party to bill for foreclosure.*—Where a mortgage debt is assigned by parol, the legal title remaining in the mortgagee, he is a necessary party to a bill for foreclosure, filed by the assignee.—*Ib.*

ATTACHMENT.

1. *Attachment; what not subject to.*—The interest of the landlord in the crops grown on the rented premises, by reason of his lien for rent and advances, is not such a title or interest as can be levied upon under execution or attachment.—*Starnes v. Allen West & Co.*, 317.

ATTACHMENT—*Continued.*

2. *Attachment ; for what will lie.*—Any civil action, whether founded on contract or in tort—as for an assault and battery—may, under our statutes, be commenced by attachment.—*Hadley et al. v. Bryers*, 139.
3. *Same ; when properly issued against all of several defendants.*—When an action of trespass against several defendants is commenced by attachment, and the affidavit discloses a ground of attachment as to all of them, the writ is properly issued against all.—*Ib.*
4. *Same ; how levied.*—When an attachment is sued out against several persons, it may be levied on the joint property of all the defendants, or on the separate property of one or more: but a levy on separate property only operates to bring in those defendants who have an interest in it, unless they voluntarily appear.—*Ib.*
5. *Same ; effect of, on exempt property.*—The levy of an attachment on personalty which is exempt, can not affect the defendant's exemption, but the levy, although it be released on that account, will bring the defendant before the court.—*Ib.*
6. *Attachment bond ; what not ground of objection to.*—An attachment bond is properly made payable to the defendants jointly, although the writ may be levied on the individual property of one only; and the addition of the word agent to the name of one of the obligor, in affixing his signature, does not affect its validity.—*Ib.*
7. *Affidavit for attachment for tort ; what defect in, not pleadable in abatement.* The special affidavit required by statute, as to the particular facts and circumstances of the claim, where an attachment is sued out to recover damages, is intended for the single purpose of enabling the officer granting the writ to determine the amount for which a levy must be made, and its sufficiency can not be tested by plea in abatement. *Ib.*
8. When attachment can not be maintained, at suit of administrator, under the "Act to prevent homicides."—(See *Action*, 1.)
9. *Trial of right of proper under attachment ; what proper form of issue in.*—The proper issue in this action is, an affirmation on the part of the plaintiff that the property in question is subject to his execution or attachment, and a denial of that fact by defendant; and unless the plaintiff proves *prima facie*, at least, a title in the defendant, he must fail though the claimant shows no title to the property in question. Lien, right, or even title in the plaintiff, gives no right to condemn the property under the execution or attachment.—*Starnes v. Allen West & Co.*, 316.

ATTEMPT TO COMMIT OFFENSE. See CRIMINAL LAW, 11.

ATTORNEY AT LAW. See SOLICITOR.

1. *Proceedings to remove attorney ; information.*—The statutory proceeding for removing an attorney, under section 882 R. C., is in the nature of a criminal proceeding, and an information under such section must disclose with certainty the facts of misconduct, and that the defendant is amenable to the proceeding.—*Thomas v. The State, ex rel. Stegney*, 365.
2. *Directed only against licensed attorneys.*—The statute is directed only against attorneys who are regularly licensed under the laws of this State, who have taken the oath prescribed, and not against attorneys temporarily practicing in the court by mere comity.—*Ib.*
3. *Averment ; uncertainty of ; defect raised first time in Supreme Court.*—An averment in the information that the defendant "hath been, and now is, an attorney practicing in the courts of the State of Alabama, in the county of Dallas," may apply either to a licensed attorney or one without license, practicing temporarily by comity, and is for that reason uncertain in statement, and such want of certainty, being a defect of substance fatal to a judgment rendered thereon, may be raised for the first time in the appellate court.—*Ib.*
4. *Amendment ; when allowable.*—The statute of amendments is very broad and comprehends all pleadings except indictments (R. C. § 2657), and will authorize an amendment of the information, which, though quasi

ATTORNEY AT LAW—*Continued.*

- criminal, is the act of the relator as essentially as is the complaint in a civil action.—*Ib.*
5. Effect of admission by defendant's solicitor, in chancery case.—*Rogers et al. v. Torbat et al.* 523.
6. Fees of; when recoverable in action on detinue bond.—*Mills v. Long et al.* 458.—(See *Detinue*, 5.)
7. Fees of; when recoverable as damages in action on injunction bond.—*Robertson v. Robertson et al.* 68.
8. Authority of attorney to superintend execution of process.—In this State an attorney has a general authority to superintend and direct the execution of process issued on judgments which he has obtained for his clients, and may lawfully give such instructions to the officer executing it, as could be given by his client, and the process will protect him to the extent that it would protect his client.—*Smith et al. v. Gayle*, 600.

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AUDITOR.

1. Instructions by auditor to county tax collector under revenue law; what not binding.—(See *Revenue Law*, 8.)

BAIL. See CRIMINAL LAW, 12, 13.

1. *Bail bond; indemnity for liability on; to what extends.*—P.'s son was arrested on a criminal charge; plaintiff signed the son's bail bond, receiving certain jewelry as indemnity, agreeing to return it as soon as P. authorized plaintiff to go on the bond. Upon execution of the bail bond the son was released from custody. The next day P. telegraphed plaintiff, "My son is arrested in your town. Go surety for his appearance, and I will save you harmless." On receipt of the telegram, plaintiff restored the jewelry to the son, who afterwards continued at large under the bond already executed. The son, not having appeared, a conditional judgment was rendered against the obligors on the bond. Afterwards, by consent of court, the solicitor agreed to discontinue proceeding on the bond, if plaintiff would confess "judgment for costs as upon conviction," and afterwards a *nolle prosequi* was entered, by consent of court, as to the criminal charge, "upon payment of costs of the prosecution, as if upon conviction," and plaintiff thereupon confessed judgment, which was rendered against him accordingly. Plaintiff then brought suit against P.'s administrator to recover the amount plaintiff was compelled to pay on the judgment. *Held*,

1. This is not a case of a mere naked promise to indemnify the plaintiff against a liability previously incurred for a third person without request; but a promise, founded on a consideration which was executory and continuous in its nature, to-wit: not only taking the son out of jail, but keeping him out.

2. Although no new bond was executed after the telegram was received, yet the plaintiff having, at any time afterwards, the right to surrender the son, and not having done so, had fully complied with all that was of substance in the father's request, to the benefit of the father and son, and could maintain an action against the father to recover the damage which the plaintiff had sustained.

3. The substance and spirit of the request were such as authorized plaintiff, under the circumstances, after proceedings to forfeit the bond on account of the son's non-appearance, to confess judgment for costs, as upon conviction, upon judgment of *nolle prosequi* entered by consent of court upon these terms, and the indemnity promised, extends to the damages which the surety thereby sustained.—*Bestor, Adm'r, v. Roberts*, 331.

BAILMENT AND BAILEE. See COMMON CARRIER, 1; SALES, 4.

BILL OF EXCEPTIONS.

1. *Motion to establish ; charges of the court ; exception at bar ; amendment.*—The court charged the jury, that, "When an assault is made and resistance or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon is used in a very cruel manner, not justified at all by the nature and danger of the assault, the offense amounts to murder. A good definition of cruelty is, the infliction of great pain or misery without necessity. Death causes misery to the family of those bereaved,"—and the defendant then excepted at bar to "that part of the charge about cruelty and the part connected therewith;" but, in writing out the bill, they presented the exception as follows: "An exception was also reserved to each and every part of the following portion of the judge's charge, to-wit, (and here the part above quoted was set out);" and the judge afterwards struck out, of the paragraph quoted, all except the last two sentences, which contained the definition of cruelty, so as to make it appear that the exception was to that part only, whereupon motion is made to correct the bill of exceptions. *Held,*
 1. That the exception at bar raised also the question of error in the construction respecting the effect—as evidence of homicidal malice—of cruelty on the part of a person assailed in the manner of his slaying the assailant.
 2. That the exception now contained in the bill, should be stricken out and the following inserted: "And defendant excepted to the definition of cruelty in the following charge, and also to so much thereof as explains the effect—as evidence of malice—of the use, by one assailed, of a deadly weapon in a cruel manner, against his assailant."—*Judge v. The State*, 402.
2. *Bill of exceptions ; evidence set out therein.*—Where certain evidence is set out in the bill of exceptions, but it is not expressly stated that such is all the evidence given, this court can not hold that the bill of exceptions contains all of the evidence.—*Griggs v. The State*, 425.
3. *Charge of court ; what exception to, unavailing.*—It is the duty of a party excepting to the general charge of the court to point out specifically the error complained of, that the court below may have the opportunity to correct it, if erroneous, or the opposite party may waive the giving of the objectionable part. A mere general exception does not accomplish this purpose, and if reserved to the entire charge, containing distinct and separate propositions, some of which are correct and others incorrect, the exception will be unavailing.—*Mayberry v. Leach, Harrison & Forwood*, 339.
4. *Same.*—An exception to the general charge of the court, couched in language as follows, "To which charge, and each and every part of it, defendant excepted," is a mere general exception, and unavailing, unless the charge is erroneous as an entirety.—*Ib.*
5. *Same ; when refusal to give, not revised.*—The refusal to give charges requested, will not be revised on error, unless it affirmatively appears they were asked for in writing.—*Ib.*
6. A judgment on demurrer, shown only by the bill of exceptions, will not be revised on appeal.—*Sternau v. Marx*, 608; *Morgan v. Wing*, 301.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange ; what is not.*—A bill of exchange is an order or letter requesting the payment of money; an order requesting the delivery of cotton is not such a bill.—*Auerbach et al. v. Prichett*, 451.
2. *Same ; oral acceptance, sufficiency of.*—Under section 2101 of the Code of 1876, an oral acceptance of a bill of exchange is not binding; but in the absence of such statute an oral acceptance would be sufficient. An order for the delivery of cotton not being a bill of exchange, such statute has no application, and hence an oral acceptance thereof is sufficient.—*Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

3. *Promissory note; what is not; what contract not within § 2890 of Code.*—A cotton obligation, or promise to pay cotton "raised on land sold to the obligor, cultivated to the best of his skill and ability, as second payment on said tract of land, to be delivered to the payee," &c., is not a promissory note, nor one of the contracts enumerated in section 2890 of the Code of 1876, on which actions "must be prosecuted in the name of the party really interested, whether he has the legal title or not."—*Ib.*
4. *Same; death of payee; when legal title will not pass by indorsement.*—Where the payee of such obligation dies, the legal title thereto vests in his personal representative; but between the time of his death and the appointment of his widow as administratrix, the legal title and the right to sue is in abeyance, and she cannot then transfer such title or right to sue by indorsing the obligation to a third party.—*Ib.*
5. *Same; necessary parties to bill to enforce vendor's lien.*—Though such widow indorse such obligation before her appointment as administratrix, the legal title thereto vests in her when so appointed, and she and her indorsee become necessary parties complainant to a bill seeking to enforce a lien on land for which such obligation was given as part payment of the purchase.—*Ib.*
6. *Same; liability of maker to assignee; estoppel.*—If a promissory note, or other evidence of debt, is purchased on the faith of a promise by the maker to pay it, he will be compelled, at all events, to pay the assignee, and is estopped from asserting the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known at the time of such promise, or of a subsequent failure of consideration. And the same rule applies if the promisor had previously accepted an order to pay the debt, or any part of it, to another.—*Ib.*
7. *Promise to pay obligation; burden of proof on assignee.*—Where A. makes a written obligation payable to B., and B. assigns the same as collateral to C., who relies upon the agreement of A. to pay to him such obligation, the onus of proving such agreement rests on C.—*Ib.*
8. *Promissory note payable to two persons; prima facie import of.*—A note payable to two persons, *prima facie*, imports that each has a joint and coeval interest; but it may, nevertheless, be shown that the consideration moved from them in separate and unequal amounts and values.—*Tisdale, Ex'r v. Maxwell, 40.*
9. *Same; collections under; when subject of set-off by executor of one of the payees, when such by the other.*—The executor of one of the payees, when sued by the other on another demand, may set-off against him the amount in excess of his share, which the plaintiff collected on such note.—*Ib.*
10. *Transaction with deceased person; what does not involve.*—On an issue in such a case, as to the interest which the respective payees had in such a note, the plaintiff is a competent witness to prove the consideration of the note, who owned the property which formed that consideration, and its value; such evidence, on his part, does not involve any "transaction with, or statement by" the decedent, within the meaning of § 3058 of the Code.—*Ib.*
11. *Same; what constitutes.*—Any understanding between the two, by which the note was made payable to both, or by which the testator was to take certain property turned over by the makers of the note, etc., would involve a transaction with the decedent; and the plaintiff is not a competent witness, in his own behalf, to prove such facts.—*Ib.*
12. *Promissory note; giving of; what presumptive evidence of.*—The giving of a note is *prima facie* evidence of the settlement of all previous accounts between the parties; but no such presumption arises as to notes previously given.—*Ib.*
13. *Same; presumption as to ownership of.*—Where a note, payable to two persons (not partners), is found by the executor of one of them, among the papers of his testator, after his death, and is produced on the trial, this

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

- is *prima facie* evidence that the note belonged to him in his representative capacity, and was unpaid.—*Ib.* 41.
14. *Indorsement in blank of commercial note; liability of indorser.*—A person who writes his name in blank on the back of a note, negotiable and payable in bank, before it has been indorsed or put in circulation by the payee, is bound as though he made a perfect indorsement to another person; and the payee can not recover of him, without proof of a demand for payment at maturity, and due notice of non-payment.—*Hooks v. Anderson*, 238.
 15. *Transfer of purchase-money note, when does not pass equitable lien; when operates to pass security for the debt; effect of taking new note in lieu of old.*—*Woodward v. Echols*, 665.
 16. *Assignees of notes given for land; what determines priority of payment.* Where the purchaser of lands executes several promissory notes for the purchase money, falling due at different times, and secured by mortgage, or other instrument creating a lien on the lands for their payment, an assignment of the notes is an assignment *pro tanto* of the security for their payment, in the absence of an express stipulation to the contrary; and the several assignees are entitled to priority of payment, according to the date of their respective assignments, without regard to the time when the notes severally matured.—*Ala. Gold Life Ins. Co. et al. v. Hall*, 1.
 17. *Same.*—In such case, five of the notes being payable, one, two, and three months after date, and eleven payable five years after date, with interest payable semi-annually; while the power of attorney to the vendor containing the power of sale, authorized him "to sell and convey the real estate, or so much thereof as may be necessary, upon default in payment of said notes or either of them, or the interest due thereon, as aforesaid;" and further provided, that "in case he shall have negotiated any of said notes before their maturity, so that some other person may be the lawful holder thereof, then said lawful holder of said note or notes may execute all the powers herein conferred on said" [vendor] "so far as they may apply to such note or notes held by such person, and in case of the death of said vendor, his executors or administrators may execute all the powers herein conferred, so far as they may apply to any of said notes remaining assets of his estate; and the said person conducting said sale or sales shall, from the proceeds of sale, first pay the expenses of sale, then the interest and principal on the notes then due in the order of maturity, rendering the surplus, if any, to the said" purchaser; held, that these stipulations did not change the principle above stated so far as regards the notes last falling due.—*Ib.*
 18. *Garnishment of maker of note; what debt will reach.*—The maker of a negotiable promissory note who, before its maturity, is garnished by a creditor of the payee, and after it matures takes the note up, giving the payee another negotiable note in extension of the debt, can not thereby affect the rights of the garnishing creditor; and the first note being owned and held by the payee at maturity, judgment in favor of the garnishing creditor is properly rendered against the maker, although the renewal note has not matured and the maker does not know who owns it.—*Leslie v. Merrill, Filch & Allen*, 322.
 19. *Payee of promissory note may lawfully transfer it. Usury; who can not set up.*—The payee of a valid promissory note, not tainted with usury, may lawfully sell and transfer it for less than the amount due by its terms; and a third person can not, in a contest with the transferee, be heard to insist that the transaction is usurious.—*Ala. Gold Life Ins. Co. et al. v. Hall*, 1.
 20. *Transfer of purchase-money note; when does not pass equitable lien.*—A transfer by delivery of a promissory note given to the vendor for the purchase-money of lands, if made subsequently to the conveyance of the legal title, does not pass the equitable lien of the vendor.—*Woodward v. Echols*, 665.
 21. *Same; when operates to pass security for the debt; relation created between the*

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued*

- parties.*—Where the transfer of the note was prior to the conveyance of the legal title which remained in the vendor as a security for the purchase-money, the relations of the parties was, in legal effect, that of mortgagor and mortgagee; and, whatever may have been the form of the transfer, the security which was incident to the debt, passed by a transfer of the debt—the contrary not being stipulated.—*Ib.*
22. *Same; vendor and vendee, no power to impair transferee's security; subsequent conveyance subordinate.*—The vendee, having knowledge of the transfer of the debt before the conveyance to him was executed, it is not within the power of him and the vendor to impair such security after the transfer of the note—the subsequent conveyance is subordinate to the security, and is no obstacle to its enforcement.—*Ib.*
23. *Same; effect of taking new note from vendee in lieu of old.*—Where the transferee, subsequent to the conveyance of the legal title, takes in lieu of the old note, a new note from the vendee, extending the time of payment, the security is not thereby impaired—especially when all intention to waive it is negated by the recital in the new note of its original consideration.—*Ib.*

BONDS. See BAIL—DETINUE—EXECUTORS, &c.—INJUNCTION—RAILROADS.

CARNAL ABUSE. See CRIMINAL LAW, 14.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Fraudulent conveyance; right to proceed at law; when will not interfere with right to proceed in equity.*—Because a judgment creditor may, at law, proceed to sell under execution, lands which his debtor has fraudulently aliened, and the purchaser may, in ejectment, recover them of the fraudulent donee, the existence of such rights does not interfere with the right to resort to equity for the vacation of a fraudulent conveyance as an obstacle in the way of the full enforcement of the judgment, and a cloud on the title to the property.—*Flewellen et al. v. Crane*, 627.
2. *Adequacy of legal remedy; when will not defeat relief in equity.*—Where the subject matter of the suit does not lie without the jurisdiction of a court of equity,—as a bill to recover rents,—and the parties go on to a hearing and decree on the merits, without raising the objection that the remedy at law is adequate, the objection is waived, and can not be urged on appeal.—*Tubb v. Fort*, 278.
3. *Executor may retain money due him; when claim too small for chancery jurisdiction.*—Where the entire debt due an estate from the executor amounted to \$2,850, and his legacy and commissions were \$2,800, he was authorized to retain the amount due him out of the \$2,850, leaving him to account for the small residuum of \$50; and where the complainant is entitled to only 1-24 ($\frac{1}{24}$ of $\frac{1}{2}$) of such residuum, his claim is too small for chancery jurisdiction.—*Morris et al. v. Morris*, 444.
4. *Bill for account; when without equity because account adjustable at law.*—A. and W. were judgment creditors of V. for unequal accounts, having the same attorney through whom the judgments were compromised for an aggregate sum, which was to be applied to the judgments in proportion to their respective amounts. W. had received more than he was entitled to, and the attorney had a sum on hand which he was willing to pay to the party entitled to it. A. filed a bill praying a decree declaring her entitled to the money on hand, and for a decree against W. for the excess received by him above his proportion of the aggregate amount of the compromise,—*held*, that the bill was without equity; the demand being purely legal, its amount ascertainable by simple calculation, and the remedy at law adequate.—*Avery, Adm'r v. Ware et al.* 475.
5. *Same.*—Whether or not the statutory lien given in favor of the State to secure bonds endorsed under the internal improvement aid law can operate in favor of a holder of such bonds, and entitle him to be subrogated to such

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- lien, is a question that can be decided in no other than a chancery court, and if the chancellor commits error in a decree thereon, it is not to be revised or corrected by a writ of prohibition.—*Ex parte Brown*, 536.
6. *One seeking equity, must do equity.*—It is an inflexible rule, that where a party is forced to seek equity, he must do equity.—*Smith et al. v. Murphy et al.* 630.
7. *Same; when bill in equity will not lie for recovery of.*—Where the right to recover rent is legal, and there is an adequate legal remedy, a court of chancery should not, in the absence of some equitable ground, take jurisdiction to decree its recovery.—*Tubb v. Fort*, 277.

I. PLEADING AND PRACTICE.

8. *Consolidation of suits concerning the same property, pending in same court.*—Where two or more suits are pending in the same chancery court, asserting conflicting rights in the same property, and the facts of each case need to be ascertained before the rights of any can be definitely settled, they should be consolidated that they may be heard together; or, if that can not be done, the suit involving the more important questions ought to be first determined, and the hearing of the other stayed until such determination.—*Ex parte Brown*, 536.
9. *Same; practice in disposing of such suits.*—The parties interested should call to the court's attention the order disposing of such suits, by appropriate and timely motion. And though one of the cases precedes the other, the chancellor may, without partiality, decline to proceed with it until the other cases are brought to a hearing, if thereby injustice would be done other complainants.—*Id.*
10. *The omission of indispensable parties to a bill*—is an error for which the appellate court will reverse a decree, though no objection to their absence was taken in the Chancery Court.—*Watson v. Oates*, 647.
11. *Heirs necessary parties to bill seeking to divest them of their title.*—When a bill to redeem lands seeks to divest the title out of the heirs of decedent, and vest the same in complainants, it is indispensable—to obtain the relief sought—that such heirs should be made parties defendant.—*Smith et al. v. Murphy et al.* 630.
12. *Distribution; part husband takes in wife's personally; parties to bill for distribution.*—Where husband and wife sell lands of her statutory estate, taking notes for the purchase-money, her estate is thereby converted into personalty, and her husband, on her death intestate, takes one-half absolutely; and where the wife's distributees seek to enforce the vendor's lien and a decree for the amount of the notes, they are not entitled to relief—though a case proper for distribution direct, without administration on the wife's estate, be shown—if the bill showing the husband survived the wife, fails to make him a party; and the objection may be raised for the first time in the appellate court.—*Marshall et al. v. Gayle et al.* 284.
13. *Same; when distributees can not maintain bill for distribution.*—Where, in such a case, administration was had on the wife's estate, which is declared insolvent, and the administrator settles and resigns, nothing further being done in the administration, the distributees directly can not maintain such a suit, and the fact that they are too poor to cause further administration or take out letters for that purpose, can not dispense with the necessity for administration, and having those interested in the estate properly before the court.—*Id.*
14. *Party having prior lien; what sufficient answer to objection that State is not made a party.*—The presence of a prior mortgagee, or a party having a prior lien, who is not subject to the jurisdiction of the court, and the validity of whose incumbrance is not disputed, may be dispensed with; and where such prior incumbrancer is a State which can not be made a party, this is a sufficient answer to the objection that it is not made a party to a suit asserting no adverse claims to the rights of the State.—*Kelly et al. v. Trustees Ala. & Cin. R. R. Co.* 490.

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15. *Misjoinder of parties complainant; when feme covert can not claim personal relief.*—To a bill seeking relief from a mortgage on account of usury, parties complainant should not be joined unless they are entitled to common relief. And though each and all may be entitled to make the defense of usury, yet where the rights of one of the complainants is that of a *feme covert* claiming that the property is her statutory estate, and not subject to the mortgage made by her for the security of another's debt, such right is personal to her, and she can not claim this personal relief under a bill filed by her conjointly with her husband and another male complainant.—*Rogers et al. v. Torbut et al.* 523.
16. *Same; parties to suit to enforce sale.*—Where an administrator files his bill to enforce a vendor's lien on lands of the decedent, sold by him, under order of the court, whether the sale be made pursuant to or in excess of the authority conferred—the sale not having been confirmed, and no conveyance having been made to the purchaser—the heirs and devisees must be made parties; and where the estate has been declared insolvent, creditors, whose claims have been filed and allowed, are also necessary parties.—*McCully v. Chapman, adm'r.* 325.
17. *Same; necessary parties to bill to enforce vendor's lien.*—Though a widow indorse a cotton obligation made by her intestate before her appointment as administratrix, the legal title thereto vests in her when so appointed, and she and her indorsee become necessary parties complainant to a bill seeking to enforce a lien on land for which such obligation was given as part payment of the purchase.—*Auerbach et al. v. Pritchett.* 451.
18. *Bill to recover legacy from executor; proper parties defendant.*—Where a bill seeks primarily and mainly to recover of an executor and his sureties, a legacy, the executor, his sureties, and the other legatees under the will, are necessary parties defendant.—*Morris et al. v. Morris.* 443.
19. *When and for what a party defendant may come in after final decree.*—After final decree in a foreclosure suit by a mortgagee against the corporation, the court will not give a stockholder leave to become a party defendant, and allow him to make answer and defense; but he might be allowed to be made a party for the purpose of allowing him to prosecute an appeal.—*Ex parte Brown.* 537.
20. *Usury; bill for relief from mortgage on account of; practice.*—Where a complainant files a bill to obtain relief from a mortgage on account of usury, he must either bring into court the money legally due, or submit himself to the court on an offer to pay, so that the court may, without more, compel him to do equity as a condition for granting relief, whereupon the court may decree a foreclosure without the filing of the cross-bill.—*Rogers v. Torbut et al.* 523.
21. *Same; practice; admission by defendant's solicitor.*—Where, in such a case, a decree of foreclosure is authorized on the original bill, without the filing of a cross-bill, the decree will not be disturbed, because on the case made by defendant turning his answer into a cross-bill, which complainants answered, the solicitors admitted that one of the complainants was a married woman at the time of the execution of the mortgage conveying her statutory estate, there being nothing in the answer authorizing the introduction of such proof, or the making of such defense.—*Ib.*
22. *Fraud; allegations of; demurrer.*—Fraud is a conclusion of law from facts stated and proved. When it is pleaded at law, or in equity, the facts out of which it is supposed to arise must be stated, a mere general averment is insufficient upon which to pronounce judgment. A demurrer to such pleading is not a confession of the fraud; for a demurrer confesses only the matters of fact which are well pleaded, and not conclusions or inferences of law or fact.—*Flewollen et al. v. Crane.* 627.
23. *Specific performance; when will not be decreed.*—In 1851, S. gave a writing to L. & N. acknowledging the receipt of \$200 in part payment of "ten acres of land," sold by S. to L. & N. at \$700, the writing also stating "the balance of the money due me, is to be paid when I can give them satisfactory titles, which I bind myself and my heirs to do." This

CHANCERY—*Continued.*

writing was attested by two witnesses. Shortly afterwards L. & N. entered upon ten acres of land of which Schuessler was in possession, and occupied and used it until the year 1871, when they sold the fences and left the land vacant, and Schuessler re-entered. Although Schuessler could not produce a satisfactory paper title, his claim was not unfounded, and no fraud was charged against him. In the year 1872, the property having increased in value to \$2,700, the representatives of L. & N., who had died in the meantime, tendered \$500, or that sum and one year's interest, for the land, but did not tender a conveyance. S. refused, unless they would pay interest, or the value of the use and occupation, which was shown to be \$150 per annum. Thereupon the heirs and representatives of L. & N. filed their bill to compel specific performance. *Held*: 1. The purchasers had as beneficial use of the land as if a conveyance had been made; and after fifteen years undisturbed use and occupation, it was not equitable to compel S. to part with the land, which had greatly increased in value, upon payment to him of only the principal of the purchase-money, without interest or compensation for the use and occupation. 2. The fact that a small portion of the purchase-money was paid, did not alter the case, and complainants only offering the principal and one year's interest, and refusing to pay for the use of the land, and not offering to do what the court might consider ought to be done, their bill ought to be dismissed.—*Id.*

24. *Vendor's lien on land; what debars enforcement of.*—If an administrator having sold lands under order of the probate court, accepts in part payment a debt due from himself to the purchaser, the distributees may elect to treat it as a payment, and hold the administrator liable, or disregard it entirely and hold the purchaser liable for the amount, and enforce a vendor's lien on the land also; yet, if, with full knowledge of the facts, they elect to charge the administrator with the amount in his accounts, they can not afterwards revoke that election, and proceed in equity against the purchaser of the land.—*Nunn et al. v. Norris, Adm'r et al.* 202.
25. *Prayer for general relief; what relief will not be granted under.*—Where the original bill sought to set aside a sale of personal property and chooses in action, on the ground that it was fraudulent as against creditors, and also asked the appointment of a receiver to take charge of the property and collect the debts, the business acquired by the purchaser being broken up by the appointment of a receiver, and the complainant failing to establish any participation on the part of the purchaser in the fraud of the vendor, the court will not, under the general prayer for relief, require the purchaser to pay over to the complainant the unpaid portion of the purchase-money.—*Florence Sewing Machine Co. v. Zeigler*, 222.
26. *Multifariousness; what is not.*—Where a bill contains a feature in which there is no equity, all the averments in that connection will be treated as redundant, and they will not make the bill multifarious.—*Morris et al. v. Morris*, 444.
27. *Conveyance by husband and wife; execution of, how brought to notice of court pending wife's suit for property; effect of.*—Where, pending the wife's suit to have the lands restored to her, she and her husband, on valuable consideration, execute a conveyance of them to the defendant, by deed duly executed and acknowledged, such defense is properly brought to the notice of the court by cross-bill; and the deed is valid, and a bar to the further maintenance of the wife's suit.—*Moses et al. v. Dade*, 211.
28. *Demurrer; what not considered.*—A demurrer for want of equity, is a mere general demurrer, which the statute forbids the court to entertain.—*Twbb v. Fort*, 278.
29. *Conveyance in fraud of creditors; for what purpose may be allowed force.*—*Porter & Son v. Gracie*, 303.
30. *Sale by and purchase from executor; what not necessary inquiry.*—Where a bill does not seek to set aside sales made by an executor, but, on the

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- contrary, ratifies and confirms them, the court need not inquire whether such sales were or could have been made under powers contained in the will, or under orders of the Probate Court.—*Morris et al. v. Morris*, 443.
31. *Necessary proofs ; failure to make.*—T. W. was entitled to one-eighth of testator's estate, but died leaving three children, of whom complainant is sole survivor, the other two children having died at the ages respectively of 14 and 12; bill was filed by the survivor, seeking to recover the entire one-eighth, which fell to him and the other two children, the averment being that the other two died leaving no debts: *Held*, 1. Such averment is very material to complainant's right to recover the interests of the two deceased children. 2. That without proof sustaining said averment, the complainant can only recover the one-third interest of the one-eighth which would have fallen to his father.—*Morris et al. v. Morris*, 444.
 32. *Administrator ; when will be enjoined at instance of heirs from selling lands of intestate to pay expenses of administration.*—A court of equity, at the instance of adult heirs, who paid up all the debts of their ancestor except a very trifling amount due a single creditor, and divided his lands among themselves, will enjoin a sale of the lands to pay expenses of administration and costs of litigation carried on by an administrator, who, without being so requested by the creditor or any heir, sued out letters and engaged in litigation, for the avowed and selfish purpose of running out of the country a person in possession, and buying the lands himself.—*Owens, adm'r v. Childs, et al.* 113.
 33. *Execution of decree ; may be temporarily restrained.*—A chancellor may, upon application to him in a particular case, restrain, temporarily, the execution of his decree, until the determination of some matter to be affected by it shall be first obtained, when justice between the parties would be thus promoted. The fact, as in this case, that the property was in the hands of the court through its receiver, would be a good reason for fixing more lenient terms upon which such stay is granted.—*Ex parte Brown*, 537.
 34. *Statutory estate of married woman ; when may be subject to costs of suit.*—The statutory separate estate of a married woman, brought within the jurisdiction of the Chancery Court, by her institution of a suit with respect to it, may be subjected, on execution against it, for the costs of suit, after fruitless execution therefor against the next friend; and although she may appeal to the Supreme Court, without giving security for costs, such part of her statutory estate will be liable for the satisfaction of the costs here, if the appeal be decided adversely to her.—*Haynie, pro am, v. Lundie*, 100.
 35. *Same*—The execution in such a case must be satisfied out of the statutory estate within the jurisdiction of the court, and can not run against the married woman personally, or her goods, chattels, or estate generally.—*Ib.*
 36. *Decree rendered in vacation ; repeal and amendments of certain statutes in reference thereto ; when an act repealed or revived.*—1. The provision of the Revised Code (§ 3470), which authorized the chancellor to render decrees in vacation, within six months, was repealed by the amendatory act of December 8th, 1873, which authorizes decrees in vacation, within ninety days, by consent. This latter act was repealed by "an act to repeal an act to amend § 3470 of the Revised Code of Alabama," approved Feb. 4th, 1876, which provided in a separate section that chancellors might, "in difficult cases, render decrees in vacation, within six months after the submission of causes." 2. Under the constitution of 1868 (Art. 4, § 2), section 3470 of the Revised Code was *ipso facto* repealed by the amendatory act of 1873, although it contained no express words of repeal. 3. The repeal of the amendatory act, by the act of Feb. 4th, 1876, did not revive or restore that section, the constitution of 1875 (Art. 10, § 2), forbidding any law to be 'revived, amended,' or the provisions thereof extended or conferred by reference to its title only. 4.

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The title of the act of Feb. 4th, 1876, "To repeal an act to amend § 3470 of the Revised Code of Alabama," does not express any intention to revive that section, and is so restricted in its title that it does not authorize the incorporation, in the one subject to which it relates, of a provision reviving that section, or substantially re-enacting it in terms; and hence its second section is unconstitutional. 5. From the passage of the act of Feb. 4th, 1876, up to the time when the Code of 1876 went into effect, there was no statute authorizing the chancellor to render decrees in vacation without the consent of the parties. 6. What effect the incorporation of the second section of the act of Feb. 4th, 1876, into the Code of 1876, will have upon cases arising since said Code went into effect, is not decided.—*Rogers et al. v. Tortut et al.* 523.

37. *Sale of lands by register; when not set aside as being premature, or because decree fails to designate place of sale.*—In a suit in chancery to subject lands to the payment of debts, a consent decree was rendered in June, 1875, ascertaining the amount of indebtedness entitled to a lien on the land, and directing that the register proceed "upon or after the 15th day of November next, to sell the lands for cash at public outcry to the highest bidder, after first giving notice of the time and place, and terms of sale, by publication" in a designated newspaper for three weeks, &c. The decree also contained this further stipulation: "If, before the 15th day of November, 1875, the defendants shall pay the costs of this suit, and \$200, to be applied *pro rata* on debts due complainants, then the sale of said lands shall be stayed until the 15th day of November, 1876, when the sale shall take place upon the same terms and conditions as above provided, unless the defendants shall before that time pay" another given sum, &c. The decree further directed, if the register should fail to advertise and sell the lands "on any of the days herein mentioned on which he is directed to sell, he shall do so as early thereafter as convenient, and if the defendants fail to pay any of the amounts herein specified, there shall be no further delay, &c. The register having first made publication as directed in the order, &c., exposed the lands for sale at public outcry at the court-house door of the county in which the lands were situate, and the court was held, on the 15th day of November, 1875, and executed a conveyance to the purchaser, who was the highest bidder. Upon the coming in of his report showing these facts, and certifying the failure of the defendants to comply with the terms of the order of sale, the defendants excepted to the report, &c., because the sale was prematurely made, and because no place of sale was designated in the decree, and the chancellor refused to confirm the report and set aside the sale, on the ground that it was prematurely made. *Held:*

1. The effect of the stipulation for a stay of sale was to confer on defendants the right to a further stay to a given day, beyond that fixed in the order, upon making payment as therein provided "before the 15th day of November, 1875," and not having made payment before that time, a sale on that day (proper advertisement first having been made) was authorized by the decree; and although defendants had the legal right, independent of the stipulations of the decree, to stop the sale at any time before it was actually made, upon paying the debt and costs, this right, in the absence of such payment or tender, could not affect the validity of the sale made on the day named in the decree.

2. A sale of lands, made after due advertisement and in the usual manner of judicial sales, at the court-house door of the county where the lands lie, will not be set aside, merely because the decree is silent as to the place where the sale is to be made.—*Hooper v. Young et al.* 585.

38. *Exception to register's report; when not considered by Supreme Court.*—Where the exceptions to the report of the register do not appear to have been passed upon by the chancellor, they can not, for the first time, be considered in the Supreme Court.—*Bryant, Adm'r, v. Stephens, et al.* 636.
39. *Reversal though no objection made below.*—This court has repeatedly held that a decree founded on a bill which does not aver facts, authorizing

CHANCERY—*Continued.*

the court to grant relief, will be reversed on error, though no objection may have been interposed in the primary court.—*Flewellen et al. v. Crane*, 627.

40. *Error without injury; what not cause for reversal.*—Where mortgagors and their lands are bound in any event for the payment of debts to different persons, it is no injury to them to give priority to either debt; hence they can not complain of a decree condemning lands for satisfaction of a mortgage, on the ground that it erroneously gave one debt a preference over the other—although the case would, perhaps, be reversible, if a party actually aggrieved had complained.—*Belkune et als. v. Oates*, 460.
41. *Failure to assign errors; case affirmed.*—When an appeal is taken to the Supreme Court, in a chancery case, the decree of the chancellor will be affirmed if there is no assignment of errors.—*Pursuett v. Brooks*, 442.
42. *Defect of parties, objection for; what may be raised for first time in appellate court.*—The omission of an indispensable party will cause a reversal on error, though the objection was not raised in the court below.—*McCully v. Chapman, Adm'r*, 325.

CHARACTER. See CRIMINAL LAW, 32, 33.

CHARGE TO THE JURY.

1. *Matters to be observed in charging the jury.*—In charging a jury, respect should be had to the evidence; and instruction should be given on every hypothesis of fact, which the testimony may tend to support. The court remarks, that "we are pleased to observe, that in this case the old, sound, and much disregarded doctrine, that 'no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat,' has been given in charge, and must have been acted on by the jury.—*Judge v. The State*, 407.
2. *Charges; when properly refused.*—Charges assuming facts as proved, of which there is no evidence, are properly refused.—*Cummins v. The State*, 387.
3. *Same.*—A charge which might lead the jury to believe that irrelevant matter as to the conduct of a third person, not on trial, should influence their verdict as to the prisoner, is properly refused.—*Little v. The State*, 265.
4. *Same.*—A charge that the suppression of evidence by the prosecution is a material circumstance for the consideration of the jury, is properly refused, when it is not shown that the evidence would shed any light on the guilt or innocence of the accused, or that it was in the possession of the prosecutor or was improperly withheld.—*Fincher v. The State*, 215.
5. *Same.*—A charge that "proof of contradictory statements or declarations on a material point made by a witness may be sufficient to raise a reasonable doubt in the minds of the jury," is, as it stands, calculated to mislead the jury. Such a charge would be proper if it contained the additional clause, "if the guilt of the prisoner depended upon the testimony of this witness,"—or this, "if the truth of this witness' testimony."—*Washington et al. v. The State*, 355.
6. *Same.*—A refusal to give a charge, no matter what it asserts, is no ground for reversal, unless the record shows affirmatively that there was evidence tending to prove every fact it supposes; failing in this, the charge is considered abstract, and rightly refused on that account.—*Williams v. Barksdale*, 288.
7. *Charge as to affirmative and negative testimony; when properly refused.*—A charge which asserts that "where one man swears positively that he saw or heard a certain thing, and any number of witnesses swear that they did not see or hear it, then the witness swearing affirmatively that he saw or heard it, outweighs the others," is properly refused, because not confined to witnesses equally credible and having equal means of knowledge.—*Savannah & Memphis R. R. Co. v. Shearer*, 672.

CHARGE TO THE JURY—*Continued.*

8. Charges in an action against a writer of a letter making false recommendation.—*Einstein, Hersch & Co. v. Marshall & Conley*, 153.
9. Charge; right of party to favorable instructions.—A party has a right to instructions favorable to him, based on a hypothesis which the evidence tends to support; and such charges are not objectionable because founded on a partial view of the evidence.—*Bibb & Falkner, Ex'rs, v. Mitchell, Adm'r*, 657.
10. Same; what error to refuse.—A charge, speaking of the corroborating evidence necessary to sustain a witness not worthy of credit, which says "such corroborating testimony in order to avail anything must be of a fact tending to show the guilt of defendant," is proper and its refusal is error.—*Washington et al. v. The State*, 355.
11. Charge given; what not error; when explanatory charge allowable.—Where a charge asserts a general principle correctly, but is objected to because of its tendency to mislead, owing to the facts of a particular case, it is the privilege of the party objecting to ask an explanatory charge. A charge given, which is objectionable alone because of its tendency to mislead, is no ground for reversal.—*Smith v. Fellows, Adm'r*, 467.
12. Erroneous charge as to the measure of damages in an action for breach of contract by lessee of saw mill.—*Collins v. Stephens*, 543.
13. What a proper charge.—*Id.*
14. Charge that the jury should acquit on the evidence; when not error to refuse.—It is not error to refuse to instruct the jury that the prisoner is entitled to an acquittal on the evidence, unless it is of so weak and indeterminate a character that the presiding judge would feel it his duty to set aside a verdict of guilt based on it.—*Spigner v. The State*, 421.
15. Charge to find guilty; when should not be given.—A charge that "if the jury believe the evidence, they must find the defendant guilty," should not be given where the evidence is conflicting, or where, upon the evidence, the jury could legally acquit the defendant.—*Sanders v. The State*, 371.
16. Improper charge upon bad character of deceased.—*Bowles v. The State*, 335.
17. Charge; what proper in certain cases only; absence of suspicion of other guilty agent.—A charge to the jury in substance, that if the evidence tends to show that defendants committed the crime, "if it be a fact that no one else has been charged with or suspected of the crime, such fact is a circumstance to be considered by the jury;" is proper only in cases like the present, where it appears from the proof that the absence of circumstances pointing to another as the guilty agent, tends to strengthen the evidence of the guilt of accused. (The charge asked, and the circumstances in this case, are similar to the same in Hall's case (40 Ala. 698, 707), and this court now adheres to the principle in Hall's case, but confines the same to cases in which the evidence is circumstantial, pointing strongly to the guilt of the accused, and proving him to have been at a place so near to the scene of the crime, as that, if innocent, he could probably furnish some trace, or circumstance, pointing to the guilt of another, or generating a doubt of his own guilt.—*Childs et al. v. The State*, 349.
18. Same; presumption that charge was proper.—Where such a charge was given—there being cases in which it would be proper—and the bill of exceptions fails to set out enough of the evidence to show its inappropriateness, this court will presume, in favor of the court below, that there was evidence to justify the charge.—*Id.*
19. Erroneous charge ignoring essential elements of murder.—*Judge v. The State*, 406.
20. Same as to death, from negligence, of wounded man or nurses.—*Id.* 407.
21. Charge of court; what exception to, unavailing.—It is the duty of a party excepting to the general charge of the court to point out specifically the error complained of, that the court below may have the opportunity to correct it, if erroneous, or the opposite party may waive the giving of the objectionable part. A mere general exception does not accomplish

CHARGE TO THE JURY—*Continued.*

- this purpose, and if reserved to the entire charge, containing distinct and separate propositions, some of which are correct and others incorrect, the exception will be unavailing.—*Mayberry v. Leuch, Harrison & Forwood*, 339.
22. *Same*.—An exception to the general charge of the court, couched in language as follows, "To which charge, and each and every part of it, defendant excepted," is a mere general exception, and unavailing, unless the charge is erroneous as an entirety.—*Id.*
 23. *Same*; when refusal to give, not revised.—The refusal to give charges requested, will not be revised on error, unless it affirmatively appears they were asked for in writing.—*Id.*
 24. *Charge*; when not part of the record.—A charge not set forth or identified by the bill of exceptions, and not marked "given" or "refused," and signed by the judge, is not part of the record, and can not become such by being copied in the transcript.—*Little v. The State*, 265.
 25. *Same*.—Although the presiding judge does not write "given" or "refused" upon a written charge, and does not sign his name thereto, yet, if the charge is set forth in the bill of exceptions, which shows that it was asked in writing, and that exception was reserved to the ruling of the court, error can be assigned in the appellate court on such ruling.—*Id.*

CHARTER. See CORPORATIONS.

CODE OF 1876. See REVISED CODE.

1. § 421. Duty of tax collector.—*Perry County et al. v. Railroad Co. et al.* 547.
2. § 495. subdivision 15. License tax on dealers in pistols, &c., construed. *Porter & Co. v. The State*, 66.
3. § 1704. To define and regulate the liabilities of railroad companies. Not distinguishable from similar act of 1877.—*Zeigler v. S. & N. R. R. Co.* 594.
4. §§ 2405-7. What rule does not apply to bonds given under.—*Buckley v. McGuire et al.* 226.
5. §§ 2597-8. Barring claims against estates of decedents. Purposes, &c., of the statute.—*Smith v. Fellows' Adm'r.* 467.
6. §§ 2705-6, 2711. Wife's statutory separate estate. Liability for necessities. Object of statute.—*Baker v. Flournoy & Wife*, 650.
7. § 2890. Actions prosecuted in name of party really interested; what contract not within the statute.—*Auerbach et al. v. Pritchett*, 451.
8. § 3058. Competency of witness; to what beneficiary can not testify.—*Drew v. Simons*, 463. What is and what not a "transaction with, or statement by" decedent, within the statute.—*Tisdale, Ex'r, v. Maxwell*, 40.
9. §§ 3419-20. Action against a private corporation to have declaration of forfeiture of charter for misuser, or non-user.—*Tuscaloosa Scientific & Art Ass'n v. The State, ex rel. Murphy*, 54.
10. § 3653. Defining murder; erroneous charge under the statute.—*Judge v. The State*, 406.
11. § 4189. Intermarriage and adultery of white persons with negroes; statute declared constitutional.—*Green v. The State*, 190 (overruling *Burns v. The State*, 48 Ala. 195).
12. § 4205. Selling or giving liquor to persons of known intemperate habits; what no offense under the statute.—*Young v. The State*, 353.
13. § 4306. Abuse in attempt to carnally know a female under ten years of age; meaning of term "abuse."—*Dawkins v. The State*, 360.
14. §§ 4445-6. Carrying on lottery; acting for another in disposing of lottery ticket; conviction of what; election by solicitor; fees of solicitor.—*Ex parte Tompkins*, 71.

COMMERCIAL PAPER. See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

COMMON CARRIERS.

1. *Bailee, failure by, to assert lien on goods held, when waiver of.*—If a common carrier or other bailee, when goods are demanded of him by the true owner, refuses to deliver them except to the consignee, or to the person holding the receipt given for transportation, but asserts no lien for storage paid by him, he cannot afterwards set up that claim to defeat an action by the owner, but must be held to have waived it.—*Leigh Bros. v. Mobile & Ohio R. R. Co.* 165.
2. *Consignee, delivery to; what may amount.*—There are cases in which a carrier on a river may exonerate himself from liability for non-delivery of goods, although they were not delivered to the consignee, by proof that the goods were delivered at the landing to which they were consigned, in accordance with the well established custom of the community in receiving goods destined to that point; but such a custom must be shown to be a reasonable one in view of all the circumstances.—*Stone et al. v. Rice*, 95.
3. *Same; what not a delivery.*—A steamboat carrier, having goods consigned to a consignee at a particular landing, where there had been a warehouse-keeper who usually received and took care of goods landed there, can not avoid liability by proving a delivery of goods at the usual place on the river bank, without any protection or guard, when the landing had, in the meantime, been broken up by an inundation, and the washing away of the buildings, and the removal of the persons, which constituted it a landing.—*Ib.*

COMPROMISE.

1. *Compromise; money paid on; when can not be recovered back.*—Money paid in compromise of a doubtful or disputed claim, can not be recovered back by action for money had and received. Thus, where a judgment creditor, having an execution levied on his debtor's land, in May, 1870 (after the decision of *Hepburn v. Griswold*, 8 Wall. 603, which held the legal tender acts of Congress not applicable to existing contracts), instructed the clerk and sheriff to receive nothing but gold and silver, or its equivalent, in satisfaction of the debt, and refused to receive legal tender notes except at 15 per cent. discount, which was then the premium on gold, and which the defendant refused to pay, but offered to pay them at 10 per cent. discount, which offer the plaintiff finally accepted. *Held*, that the premium paid could not be recovered, after the overruling of *Hepburn v. Griswold*, *supra*.—*Troy, adm'r v. Bland*, 197.

CONFEDERATE MONEY. See **CONFEDERATE STATES**, 6-8.

CONFEDERATE STATES.

1. *Legislative enactments and proceedings in the courts of the State during the war; validity of.*—Legislative enactments, and proceedings in the courts of this State, while it adhered to the Confederate States, for the preservation of order, the protection of property, the enforcement of contracts, and in the general administration of civil government, and not with the purpose of aiding the war then raging between the United States and the Confederate States, are valid and binding in all respects.—*McGuire et als. v. Buckley*, 120.
2. *Overthrow of the Confederacy; effect of, on States giving allegiance to.*—What was the status of States adhering to the Confederate States, after its overthrow by the United States, and what were the consequences resulting therefrom; whether it left the resisting States subject to the will of the United States, as conquered foreign States would have been, or whether they remained States to be dealt with by the conquering power under the limitations of the Constitution; and what those limitations required in the rehabilitation of the States, are political questions

CONFEDERATE STATES—*Continued*

which can not be determined by the courts of a State, which, together with all of its officers, hold power derivatively, from measures devised by the United States for the re-admission of the States within the Union, acquiesced in by the people of the State, and recognized by the Federal government. The practical question, when such matters are brought before the courts, is, not what the conquering power might or should have done, but what it actually did.—*Ib.*

3. *Conquest; effect of, on laws of conquered.*—A conquest of itself, does not overthrow municipal regulations, or civil authority; it only confers authority to do so, and until this is done, both continue.—*Ib.*
4. *Proclamation of Gov. Parsons; effect of.*—When the President of the United States, by proclamation, appointed Gov. Parsons to reorganize the civil government of the State, that officer, representing the conquering power, did not abrogate the prior statutes, vacate all its offices, and create new officers, or make any new rules for the protection of life, liberty, or property; but adopted and enforced its laws as he found them, save such as were rendered inapplicable by the results of the war. He retained, by name, nearly all the minor offices essential to the proper conduct of the government, and convenience of the people—a class to which the general administrator of Mobile belonged—and expressed a desire to fill other offices, vacated, specially named, and did not include the county administrator of Mobile; and hence that office, if it be conceded that it is an office, remained undisturbed, and continued under that government as it did before.—*Ib.* 121.
5. *Reconstruction acts; effect of.*—The fact that the Parsons' provisional government, and the State government succeeding it, were afterwards treated as illegal, and overthrown by Congressional act, could not and did not annul lawful acts done by officers of such government prior to that time; and the reconstruction acts did not abrogate the existing State government, but declared that it should be provisional only until the State was admitted to representation in Congress.—*Ib.*
6. *Money in circulation during the war; judicial knowledge.*—The court takes judicial knowledge of the fact, that during the prevalence of the late civil war, neither gold, silver, nor United States money circulated in Alabama; but that during said war, until the downfall of the Confederacy in 1865, Confederate States treasury notes, and their convertible equivalents, composed the only circulating medium.—*Morris et al. v. Morris*, 443.
7. *Sale by personal representative for Confederate money; when no devastavit committed.*—Where a personal representative, in good faith, received Confederate money in the course of administration, he did not thereby commit a *devastavit*, or incur a greater liability than to account for the honest and faithful administration of the same.—*Ib.*
8. *Faithful administration by executor, of Confederate funds.*—Where an executor had in hand, in 1864, nearly one thousand dollars Confederate currency, in trust for complainant, who was a minor residing in Texas, where the executor could not reach him, and the will directed the executor to retain it, and there is no averment or proof that he could have invested it with profit, and it became valueless in his hands at the close of the war and before he could obtain access to complainant, and the identical money was deposited in the Probate Court by the executor, where it now remains, and he dealt the same way with his own funds,—such facts present a strong case of faithful administration.—*Ib.* 444.

CONGRESS. See REMOVAL OF CAUSES—UNITED STATES.

CONQUEST. See CONFEDERATE STATES, 3.

CONSIGNMENT. See COMMON CARRIER, 2, 3.

CONSOLIDATION OF SUITS.

1. *Consolidation of suits; when properly ordered.*—Separate suits before a

CONSOLIDATION OF SUITS—*Continued.*

- justice of the peace, between the same parties on promissory notes apparently given in the same transaction, are properly consolidated in the City Court, when brought there by *certiorari* upon a single petition and bond.—*Perry et al. v. Ferguson et al.* 314.
2. *Consolidation of suits concerning the same property, pending in same court.*—Where two or more suits are pending in the same chancery court, asserting conflicting rights in the same property, and the facts of each case need to be ascertained before the rights of any can be definitely settled, they should be consolidated that they may be heard together; or, if that can not be done, the suit involving the more important questions ought to be first determined, and the hearing of the other stayed until such determination.—*Ex parte Brown*, 536.
 3. *Same; practice in disposing of such suits.*—The parties interested should call to the court's attention the order disposing of such suits, by appropriate and timely motion. And though one of the cases precedes the other, the chancellor may, without partiality, decline to proceed with it until the other cases are brought to a hearing, if thereby injustice would be done other complainants.—*Ib.*

CONSTITUTIONAL LAW.

1. *Constitution; rule for construing.*—Many rules for the construction of statutes are of but limited application to the construction of the constitution. The safest rule for construing the latter is to regard, not so much the form or manner of the expression, as the nature and object of its provisions, and the end to be accomplished, giving the words their just and legitimate meaning.—*Carroll v. The State*, 396.
2. *Same; meaning of term "proviso."*—Because the term *provided* is used in a law it does not necessarily follow that the matter which may succeed it is a *proviso* in its technical sense; it is the matter of the succeeding words, and not the form, which determines whether it is or not a technical *proviso*.—*Ib.*
3. *Interpretation of Constitution as to enacting statutes; rule.*—The only safe rule for interpreting clauses of the Constitution, which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold, when it is affirmatively shown by legal evidence, that, in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law.—*Perry County et al. v. Railroad Co. et al.* 546.
4. *Same; presumption as to entries in journals of legislature.*—Except as to those matters which the Constitution declares shall appear on the journal, the rule is to infer everything was rightly done, unless the journal shows affirmatively that some constitutional demand was disregarded. The presumption, in the absence of proof, is always in favor of official propriety.—*Ib.*
5. *Same; bill for raising revenue, what is; must originate in the House; act approved February, 1870, declared unconstitutional.*—The bill to be entitled an act "To amend an act entitled an act to establish revenue laws for the State of Alabama," approved Feb. 9th, 1870, was a bill for "raising revenue," within the meaning of the Constitution of 1868 (Art. 10, § 15), which must originate in the House of Representatives; and it affirmatively appearing from the journals that said bill originated in the Senate, it is therefore declared unconstitutional and void. (MANRING, J.—of the opinion that the question as to whether the bill was properly introduced in the Senate first, was a question for the legislature and not for the courts.)—*Ib.*
6. *Bill for raising revenue; definition; what included.*—A bill for raising revenue, as termed in the Constitution, is a bill providing for the levy of taxes as a means of collecting revenue—hence, a bill for *reducing taxation*, if it provides for collecting revenue, is still a bill for "raising revenue."—*Ib.* 547.
7. *Legislative act; prima facie presumption as to constitutionality of.*—In pronouncing on the constitutionality of an act which has received the sanc-

CONSTITUTIONAL LAW—*Continued.*

- tion of a co-ordinate department of the government—the legislative department—this court will indulge the presumption that such act is constitutional, until clearly convinced to the contrary.—*Zeigler v. S. & N. R. R. Co.* 594.
8. *Same; when void for creating liability not in "due process" of law.*—An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when, under the general law of the land, no one else is so liable under such circumstances, does not provide the "due process of law," under § 7 of the bill of rights, and is, therefore, void.—*Id.*
 9. *Due process of law; definition.*—"Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony, or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.—*Id.* 595.
 10. *Constitutional law; § 4189 of Code, validity of.*—Section 4189 of the Code, which makes it an offense for a white person and negro to intermarry, and inflicts upon persons of the different races living together in adultery, equal, though severer punishment than where that offense is committed by persons of the same race,—is a valid law of this State, and not violative of the Constitution or laws of the United States. (Overruling *Burns v. The State*, 48 Ala. 195).—*Green v. The State*, 190.
 11. *Marriage; power of State over.*—Marriage is not a mere contract, but a social or domestic institution, upon which are founded all society and order, to be regulated and controlled by the sovereign power for the good of the State; and the several States of the Union, in the adoption of the recent amendments to the constitution of the United States, designed to secure to citizens rights of a civil or political nature only, did not part with their hitherto unquestioned power of regulating, within their own borders, matters of purely social and domestic concern.—*Id.*
 12. *Exemption law; what unconstitutional.*—A State law which increases exemptions, so far as it applies to debts previously contracted, impairs the obligation of contracts and is void.—*Wilson v. Brown, et al.* 62.
 13. *Private act authorizing administratrix to sell land; validity of.*—The validity of a special act authorizing a widow in her representative capacity, as administratrix of her deceased husband, to make a private sale of the lands of her said husband and intestate, for the purpose of division among the heirs, is supported by former decisions of this court, and on account of the frequency of such enactments under former constitutions, and the number of titles involved, it is too late to reopen the question as to the legislative power to enact them.—*Watson v. Oates*, 647.
 14. *Notaries public; recognition and appointment of, under the Constitution.* (See *Notaries Public.*)

CONTRACTS.

1. *Contract; how construed.*—Contracts, not offensive to law or public policy, must have effect according to the intention of the parties. To ascertain such intention, regard must be had to the subject-matter, the relation of the parties at the time of the contract, and the law which it is justly inferable they had in view while contracting.—*Bryant, adm'r v. Stephens et al.* 636.
2. *Same.*—Every contract is entitled to the reasonable construction of which it is susceptible, and which will render it operative rather than unavailing; the law leans against the destruction of contracts because of uncertainty. Hence, if a contract is silent as to the time of performance, the law presumes that performance must be had in a reasonable time; and whatever consequence and incident is, in common sense, ap-

CONTRACTS—*Continued.*

- putenant to its terms, the parties must have understood and intended, should be attached.—*Robinson v. Bullock*, 618.
3. *Same; several instruments relating to one contract; construed together*—Where a bond for title is given, and written instruments are executed whereby a purchaser promises to deliver three bales of cotton annually, as the consideration of the purchase of land, and they concern the same subject-matter, the indorsements thereon being simultaneously executed, they must be construed together as if they were a single instrument.—*Collins v. Whigham*, 438.
 4. *Same; when void for uncertainty*.—Agreements, verbal or written, which are so vague and indefinite in their terms, that the intention of the parties cannot be fairly and reasonably collected from them, are void, and courts will not undertake to give them effect.—*Robinson v. Bullock*, 618.
 5. *Contract in the alternative; election*.—Where a contract is in the alternative, conferring on one party the right to become the purchaser of land by delivering annually a certain quantity of cotton, or to deliver a smaller quantity as rent and become a tenant, such party has his election to become purchaser or tenant within the time for paying the first annual installment; after which, on his failure to elect, the other party can treat him as either a purchaser or tenant; but an election once made by either party is irrevocable.—*Collins v. Whigham*, 438.
 6. *Same; actual performance necessary*.—An election made either by the party himself or his personal representative depends on the actual performance of either one or the other of the alternative stipulations.—*Id.*
 7. *Statutory lien for rent; arises from what relation*.—The lien the statute creates for the payment of rent arises only from the relation of landlord and tenant, and not from that of vendor and vendee.—*Id.*
 8. *Same; relation created by election, refers back to contract*.—Whenever the election is manifested by a performance or a non-performance of the stipulations, all the rights and incidents of the relation, as between the parties, and all persons who have, with notice, acquired rights which may be impaired, will attach from the time of making the contract.—*Id.*
 9. *Same; where a third party had notice of such a contract, and knew it could be converted into a contract of renting at the election of either party thereto, whatever right or interest he might acquire in crops (cotton) grown on the premises would be subordinate to the landlord's lien for rent*.—*Id.*
 10. *Same; presumption; when complaint not demurrable; question for the jury*.—Where two parties entered into a contract, the one agreeing to erect and keep in operation a steam saw mill, for the time expressed, and the other to supply it with logs to keep it in operation—though the capacity of the mill is not expressed—it is to be presumed that they intended that the mill should be of a capacity reasonably adapted to carry into effect the object they had in view; and whether the mill is of such capacity is a matter of fact for the jury; a complaint, therefore, averring the erection of a mill of particular capacity, is not demurrable for uncertainty, for if it was not reasonably adapted to carry into effect the objects of the parties, that can be shown in defense.—*Robinson v. Bullock*, 618.
 11. *Same; when complaint not demurrable, though contract, as alleged, appears uncertain, &c.*—Though the contract appear uncertain and of doubtful construction, yet the complaint was held not demurrable when it averred that a mill of particular capacity was erected at the request of the party demurring—the parties themselves thereby placing a practical interpretation on the contract which can well be adopted as its just construction, conforming to their intentions.—*Id.*
 12. *Same; partnership not created by the contract; demurrer not aided thereby*.—Upon principles settled in *Moore v. Smith*, (19 Ala. 774), and approved in *Ful v. McRee*, (36 Ala. 61), it is held that the contract in this case does not create a partnership; nor would the demurrer be aided if such relationship were created between the parties.—*Id.*

CONTRACTS—Continued.

13. *Same; when remedy at law exclusive.*—While it is a general rule that an action *ex contractu*, at law, is not maintainable between partners or partnership transactions, yet they may sue each other for the breach of distinct, positive stipulations binding on one only, contained in the partnership agreement. In such cases, the necessity of an account of the partnership transactions, not being involved, the remedy at law is generally exclusive.—*Id*
14. *Same; when altered by subsequent contract.*—Where one gave his promissory note for the excess on an exchange of lands, or for purchase of part of the lands, it being immaterial which, and subsequently gave two notes, with the recital on each that "the consideration for which this note is given, is the following described lands, lying in Coffee county," the land being the same as that upon which the original note was given; *held*, that the contract evidenced by the original note, was altered by the giving of the subsequent notes.—*Bryant, Adm'r, v. Stephens et al.* 636.
15. *Same; what inadmissible to contradict subsequent contract.*—In the absence of fraud or mistake, such recital will be considered true, and incapable of contradiction by parol evidence; and in no event can such recital be altered by mere inferences from evidence of the original contract.—*Id*.
16. *Sale of cotton, what part of contract for.*—When a contract for the sale of cotton is made in a city or town in which a board of trade is organized, having rules regulating the sale of cotton, and the purchaser, being informed of these rules, does not dissent or object to them, but proceeds with the contract, those rules become a part of it, as if incorporated into it by express stipulation, although they have not existed so long, or been known or acted on so generally, as to become binding as a custom or usage of trade.—*Leigh Bros. v. Mobile & Ohio R. R. Co.* 165.
17. *Same; what necessary to constitute.*—To constitute a sale, the parties must mutually assent that the property in the thing sold shall pass to the purchaser. A contract which confers on the party proposing to buy a right to inspect, examine and re-weigh the cotton within a specified time, and, on paying or tendering the price within a specified time, to demand a transfer of the ownership and possession, and also confers on the seller a corresponding right to demand such inspection, examination and re-weighing within the prescribed time, is not a sale, but an executory agreement for a sale, and does not pass the title of the cotton to the purchaser.—*Id*.
18. *Same; effect of order by seller to warehouseman.*—In such a case, a written order by the seller to the purchaser, directing the warehouseman, with whom the cotton was stored, to deliver it to a railroad company, for inspection and examination by the purchaser, on his paying the storage, does not pass the title to him nor change the character of the original contract between the parties; but the railroad company becomes the bailee of the seller, as between him and the purchaser.—*Id*.
19. *Contract; rescission of, what sufficient to support.*—The parties to a contract may rescind or modify it at pleasure, and their mutual assent is all that is necessary to support the rescission or modification.—*Cooper v. McIlwain*, 296.
20. Where three persons, desiring to purchase jointly a tract of land, at a sale for partition to be made, under a decree of the Probate Court, enter into a written contract, which specifies what portion of the land each is to obtain, and that the price to be paid by each is to be determined by three disinterested persons, and one of them afterwards buys at a private sale, an undivided two-thirds interest in the lands, of which purchase his two associates are fully informed; and by subsequent written contract, which expressly rescinds the former, it is recited and stipulated that "they have entered into a combination to purchase the tract of land," "the place to be purchased by C.," who was the purchaser at the private sale, and that they "agree to sell" a particular portion to M., at a specified price, and that "J. is to have" another part "at the rate per acre that the land is bid in at," and that C. is to have "all the bal-

CONTRACTS—Continued

- ance of the tract at the price bid at the sale;" and further, J. is to pay one-third of the difference, "between the costs of the portion sold to M. and its sale at \$5.50," and that C. is to pay the remaining two-thirds; *held*, that the rights of M. and J. were to be determined by this subsequent contract, and were dependent on C.'s becoming the purchaser at the sale for partition; and another person having become the purchaser at that sale, at a price which refunded to C. more than he had paid for the interest purchased at private sale, that M. and J. had no claim to a share of the profits.—*Ib.*
21. *Breach of contract by lessee of saw-mill, measure of damages; erroneous charge.*—The measure of damages in a suit by a mill owner against one to whom he had leased it, upon defendant's agreement to run it at his own expense, and pay one-fourth of the lumber sawed—the breaches alleged being the failure to run the mill at its capacity, and allowing it to remain idle for some time, and injuring it by unskillful and negligent use, etc.; the injury which results proximately from the breaches, and the facts being ascertained, the law, and not the contemplation of the parties, fixes the measure of damages; hence, it is error to charge the jury, in such a case, that "the damages must be such as both parties reasonably contemplated at the time of making the contract."—*Collins v. Stephens*, 543.
 22. *Charge to jury; when calculated to mislead.*—When the complaint contains a count for the breach of the contract of renting a saw mill, and also the common counts, the proof showing the contract of renting, and also a sale of oxen, a charge that "in this action the plaintiff, if entitled to recover at all, must recover on the contract," is, without more, calculated to mislead; it should be confined to the recovery upon the breach of the contract of rent; for payment for the oxen could be recovered under the common counts.—*Ib.*
 23. *Conflicting testimony; when case not made out by plaintiff; what a proper charge.*—In such a case, where damages are sought to be recovered for injuries to the mill, by reason of its negligent and unskillful use by defendant (two witnesses testifying on this point), it is not error to charge the jury that "if one witness swears the mill was damaged more than by ordinary wear and tear, and the other swears it was not, and both witnesses are of equal credibility, and the jury considers them equally credible, then plaintiff has not made out his case on the question of damaging the mill."—*Ib.*
 24. *Promissory note; what is not; what contract not within § 2890 of Code.*—A cotton obligation, or promise to pay cotton "raised on land sold to the obligor, cultivated to the best of his skill and ability, as second payment on said tract of land, to be delivered to the payee," &c., is not a promissory note, nor one of the contracts enumerated in section 2890 of the Code of 1876, on which actions "must be prosecuted in the name of the party really interested, whether he has the legal title or not."—*Auerbach et al. v. Pritchett*, 451.
 25. *Contract for bail bond; indemnity for liability on; to what extends.*—*Bestor, Adm'r, v. Roberts*, 331.
 26. *Contract not specifying place of payment; duty of debtor to make payment at the residence of the creditor.*—*Mayberry v. Leach, Harrison & Forwood*, 339. (See *Payment*, 1.)
 27. *Contract without the pale of corporate authority; what inquiry material to set aside same.*—*Morgan & Raynor v. Donovan*, 241.

CONVEYANCE. See DEEDS—FRAUDULENT CONVEYANCE—MORTGAGE.

1. *Compensation for recording conveyance; a fee, recoverable how.*—The compensation of a probate judge for recording a conveyance, is a fee and not costs; and may be recovered from the party for whom service is rendered in an ordinary action for work and labor done and performed. *Tillman v. Wood*, 578.
2. *Compensation to probate judge for registering conveyances; what allowed by statute.*—Registering a conveyance in the probate office is an entirety—

CONVEYANCE—*Continued.*

comprehending the body of the conveyance, the probate, acknowledgment if any, the endorsement of the day received for record, and the certificate of registration—for which service the statute fixes the compensation at twenty cents per hundred words. There is no statute authorizing a charge of a separate and additional fee for the certificate of registration. The above compensation is for the whole act.—*Id.*

3. *Conveyance by wife; what will not avoid.*—Where husband and wife, on valuable consideration, convey her lands to another by deed duly executed and acknowledged, she can not impeach it, as against the grantee, because of the fraud or undue influence of the husband, in which the grantee did not participate, which he has not induced, to which he is not a privy, and of which he was not informed.—*Moses et al. v. Dade*, 211.
4. *Same; execution of; how brought to notice of court pending wife's suit for property; effect of.*—Where, pending the wife's suit to have the lands restored to her, she and her husband, on valuable consideration, execute a conveyance of them to the defendant, by deed duly executed and acknowledged, such defense is properly brought to the notice of the court by cross bill; and the deed is valid, and a bar to the further maintenance of the wife's suit.—*Id.*

CORPORATIONS. See COMMON CARRIER—LIFE INSURANCE—MUNICIPAL CORPORATIONS—RAILROADS.

1. *Misuser or non-user; who may institute proceedings against corporation for.*—Under the act of 1843 (Clay's Dig. 515, § 39) the solicitor of the circuit was authorized to institute proceedings to have a declaration of forfeiture against a private corporation for *misuser* or *non-user*, only at the instance of and in behalf of the State; and hence it was held the solicitor could not institute such proceedings at his own volition, but only on the direction of the Attorney-General or the legislature.—*Tuscaloosa Scientific & Art Association v. State, ex rel. Murphy*, 54.
2. *Same; who may institute proceedings, under §§ 3419-20 of Code.*—Under the statute, subsequently adopted and now forming a part of the Code (§§ 3419-20) it is provided that such action may be brought on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the same is brought, and whenever security for costs is given and approved by the clerk, any person may institute and prosecute proceedings in that court, under § 3420 of the Code.—*Id.*
3. *Charter of private corporation; proceedings to vacate.*—Although individuals having no special interest in private corporations, may institute proceeding for their dissolution, yet the proceedings are something more than a mere private suit, and are conducted in the interest of the State, no matter by whom brought; and the relator can not confess error or dismiss the suit, without leave of the court before which the proceeding is pending.—*Id.*
4. *Tuscaloosa Scientific & Art Association, act incorporating; what does not authorize.*—There is nothing in the provisions of the act to incorporate the Tuscaloosa Scientific and Art Association, for the purpose of encouraging science and art and aiding the University of the State in replacing its library and establishing a scientific museum, approved February 3d, 1866, which gives any warrant for setting up a lottery, or the selling of tickets authorizing the winner to demand money in the first instance.—*Id.*
5. *Same; rules furnished agents by; admissibility of.*—Where the corporation issued and furnished rules to its agents for their guidance, in conducting the scheme of awards and prizes authorized by its charter, the corporation may introduce them in evidence, when a forfeiture of the charter is sought for violations of the charter by its agents; it being for the jury to determine, in view of the evidence, whether it was the *bona fide* purpose of the corporation to be governed by such rules, or whether the rules were mere machinery to give the conduct of its business a

CORPORATIONS—Continued.

show of legality, violations of which by agents were acquiesced in, or connived at by the officers in charge of its affairs.

6. *Witness; what jury may look to in determining weight of testimony by.*—In determining the weight to be accorded to the testimony of a witness testifying to violations of its charter by the defendant corporations, the jury may look to the fact (if they find such to be proved) that the proceeding was the result of a combination between the owners of two other rival lotteries, and such witness was interested or concerned in either of them.—*Ib.* 55.
7. *Forfeiture of charter; what not ground for.*—Where the corporation has given instructions to its agents, in accordance with its charter, for their guidance in conducting its business as prescribed by such charter, violation of these instructions by the mere agents of the corporation, without the knowledge of the corporation, is not ground for a forfeiture of the charter.—*Ib.*
8. *What inquiry material in proceedings to vacate charter for misuser.*—*Morgan & Raynor, Trustees v. Donovan*, 241.
9. *Reports of officers to stockholders; for what, will not bind corporation.*—Neither the reports of officers of a corporation made to its stockholders, nor reports made to its directory, in which certain claims for which the corporation is not bound, are estimated as liabilities of the corporation, will bind the corporation to pay either principal or interest of the debt, or prevent it from changing its purpose with regard thereto.—*Hall et al. v. Mobile & Montgomery Railway Co.* 10.
10. *Judicial notice of charters and powers of private corporations.*—Judicial notice can not be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter, i. e. a special act of incorporation. If it is shown, however, to have been incorporated under the general laws, which authorize the formation and define the powers of corporations, these are public laws, of which notice must be taken, and the power must be referred to such general laws.—*Kelly et al. v. Trustees Ala. & Cin. R. R.* (c. 489).
11. *Pledge of stock; when pledgee has no authority to sell.*—Where a stockholder of an incorporated company borrows money, and as security causes his shares to be transferred to the lender on the book of the company (R. O. § 1783-8), the transaction is a pledge, and not a mortgage, and the lender has no right to sell or transfer the shares to another, without demanding payment of the debtor, or giving him notice of the intention to sell; nor can the lender sell at private sale for less than the market value of the shares.—*Nabring v. Bank of Mobile*, 205.
12. *Same; conversion of shares; when pledgee may recoup debt, etc.*—Trover lies for the conversion of shares in an incorporated company; and the pledgee, when sued for such conversion, may recoup his debt from the pledger.—*Ib.*
13. *Trover for conversion of stock; what title will not support.*—Although a stockholder, whose shares have been duly transferred on the books of the company, as security for a debt, may not have such legal title as will enable him to maintain trover against the pledgee, for an unauthorized sale, he may maintain a special action on the case; and a count in case may be added to the complaint in trover by amendment.—*Ib.*
14. *Execution; upon what can not be levied.*—An execution can not be levied on shares of stock of an incorporated company, which have been pledged or mortgaged by the defendant in execution, as security for a debt, and transferred on the books of the company to the pledgee or mortgagee; and a purchaser at a sheriff's sale, under such levy, acquires no title to the shares.—*Ib.* 204.
15. *Question as to power of corporation to acquire property; when and by whom may be raised.*—*Morgan & Raynor, Trustees, v. Donovan*, 241.
16. *Charter of the City of Selma construed in part.* (See *Selma*, 1.)

COSTS. See **FEE AND COSTS**, 4, 6—**CRIMINAL LAW**, 133.

1. *Statutory estate of married woman; when may be subjected to costs of suit.*—The statutory separate estate of a married woman, brought within the jurisdiction of the Chancery Court, by her institution of a suit with respect to it, may be subjected, on execution against it, for the costs of suit, after fruitless execution therefor against the next friend; and although she may appeal to the Supreme Court, without giving security for costs, such part of her statutory estate will be liable for the satisfaction of the costs here, if the appeal be decided adversely to her.—*Haynie, pro ami, v. Lundie et al.* 100.
2. *Same.*—The execution in such a case must be satisfied out of the statutory estate within the jurisdiction of the court, and can not run against the married woman personally, or her goods, chattels, or estate generally.—*Id.*

COURTS.

1. *City Court of Selma; duty of appellate court on reviewing finding on facts.*—Under the statute establishing the City Court of Selma, there can be no presumption in favor of its findings on facts, in civil cases, tried without the intervention of a jury, when brought before this court on appeal; and if the appellate court find error of law or fact in such judgment, it must reverse and render judgment, or remand the cause, as seems proper in the particular case.—*McCrory v. Slaughter*, 230.
2. *Commissioner's court; no power to levy on railroads for escaped taxes.*—(See *Revenue Law*, 7.)
3. *Supreme Court of United States; decisions of, when binding on State Supreme Court.*—(See *United States*, 2.)

CRIMINAL LAW.

ACCOMPLICES.

1. *Accomplice; when conviction may be had on uncorroborated testimony of.* Under our present statutes, a conviction for a felony can not be had on the uncorroborated testimony of an accomplice; but in misdemeanors, the jury may convict on his uncorroborated evidence, if they credit him.—*Mose v. The State*, 117.
2. *Same.*—It is for the jury to determine from the facts and circumstances of the case, how far the complicity of the witness in the offense affects his credibility in misdemeanors, and where the offense is mere *malum prohibitum*, a charge that the witness' complicity in it detracts "very materially" from his credibility, is erroneous and properly refused.—*Id.*
3. *Refusal to pass on evidence, and discharge co-defendant.*—Where there was some evidence tending to show that a co-defendant was a participant in the commission of the offense, its sufficiency being a question for the jury—whether he was an accomplice, being one of the questions—the court properly refused to pronounce criminalizing evidence unworthy of belief, and order such prisoner's discharge on the ground that there was not sufficient evidence to convict him.—*Washington et al. v. The State*, 355.

ACQUITTAL. See 55.

ADULTERY.

4. *Statute punishing adultery of whites with blacks, declared constitutional.* *Green v. The State*, 190.
5. *An agreement between a man and woman to commit adultery does not constitute a conspiracy.*—*Miles et al. v. The State*, 390.
6. *Confessions by one adulterer; when not evidence against the other.*—Confessions made by one of two defendants—charged with adultery—in the absence of the other, are not evidence against the absent defendant. *Gore et al. v. The State*, 391.

CRIMINAL LAW—Continued.

APPEAL. See ERROR AND APPEAL.

7. *Appeal in criminal case; when will be dismissed.*—An appeal does not lie in a criminal case until after judgment on the verdict, and if prematurely taken, will be dismissed that the court below may proceed.—*Gore et al. v. The State*, 391.
8. Appeal from primary court denying bail; when primary court will interfere.—*Ex parte Nettles*, 268.

ARREST OF JUDGMENT. See NEW TRIAL.

ASSAULT AND BATTERY.

9. Homicide in resenting an assault; when murder and when manslaughter. *Judge v. The State*, 406. (See *Murder*, &c).
10. Action by administrator to recover damages for an assault and battery upon the decedent in his life-time (See *Action* 1).

ATTEMPT TO COMMIT AN OFFENSE.

11. *Attempt to commit offense, misdemeanor; charge of, actionable.*—The attempt to commit a felony or misdemeanor, is a misdemeanor; an attempt to commit larceny involves moral turpitude, and such offense is indictable and punishable by fine, imprisonment, or hard labor; hence, a charge of such offense is actionable *per se*.—*Berdeaux v. Davis*, 611.

BAIL. See THAT TITLE.

12. *Bail; rules governing applications for.*—No general rules can be laid down governing every case where bail is applied for; but it is a safe practice to deny bail, whenever the count would sustain a capital conviction by the jury, if pronounced on the evidence introduced on the application for bail.—*Ex parte Nettles*, 268.
13. *Same; decision of primary tribunal denying; weight to be accorded to.* Where the decision of the primary tribunal, denying bail, is sought to be reviewed, and the correctness of its decision rests on the weighing of evidence, the appellate court can not be unmindful of the superior advantages which the lower court has, by observing the conduct and demeanor of witnesses, in determining the weight which should be attached to the testimony of the different witnesses, and will not interfere, unless it is very clear that the primary court has erred.—*Id.*

BILL OF EXCEPTIONS. See THAT TITLE.

CARNAL ABUSE.

14. *Meaning of the term "abuse," in the statute.*—The term "abuse," in the statute (Code of 1876, § 4306), punishing carnal knowledge, or abuse in attempting to have carnal knowledge of female child under ten years, must be limited in its meaning to injuries to the genital organs, in the attempt at carnal knowledge, falling short of actual penetration; it was not intended to mean other forcible or wrongful ill-usage, such as might support an indictment for an assault with intent to ravish.—*Dawkins v. The State*, 376.

CHALLENGING JURORS. See POST, 57.

CHARACTER. See EVIDENCE IN CRIMINAL CASES, 32, 33.

CHARGE TO JURY. See THAT TITLE.

CONFESSIONS AND DECLARATIONS. See 27, 35.

CONSPIRACY.

CRIMINAL LAW—Continued.

15. *Conspiracy; agreement to commit adultery, does not constitute.*—A mere agreement of a man and woman to commit adultery, or fornication, is not a conspiracy to commit a misdemeanor.—*Miles et al. v. The State*, 390.
16. *A criminal intent must be accompanied by an act, in furtherance of it, before it can become the subject of an indictment.*—*Id.*

COSTS.

17. Judgment imposing hard labor for costs; what should be specified.—*Walker v. The State*, 393.

CRIMINAL INTENT.

18. A criminal intent must be accompanied by an act, in furtherance of it, before it can become the subject of an indictment.—*Miles et al. v. The State*, 390.

DYING DECLARATIONS. See POST, 34, 35.

ELECTION BY PROSECUTOR. See LOTTERY.

EVIDENCE IN CRIMINAL CASES. See WITNESSES IN CRIMINAL CASES.

19. Refusing to pass on the evidence and discharge; co-defendant.—*Washington et al. v. The State*, 355.
20. *Duty of the judge in admitting or excluding evidence.*—It is the duty of the presiding judge, if satisfied that he has illegally admitted or excluded evidence, to correct the error during the trial by withdrawing from the jury evidence improperly admitted, or by admitting evidence improperly excluded, and such action of the court is not error if its final ruling is correct.—*Snow et al. v. The State*, 372.
21. *Evidence; admissibility and relevancy of.*—The testimony of a witness, who lived in the prisoner's family the Spring before a murder which he was accused of committing that Fall, as to where he kept his gun, and as to the hour at which certain of his children, who were witnesses, arose, is too remote to afford any reasonable inference as to where the gun was kept the night preceding and on the morning of the murder, or as to what time the children rose that morning; and is properly excluded.—*Fincher v. The State*, 215.
22. *Evidence; relevancy of, not appearing of record; question properly excluded.* Where the court refused to allow a witness to state why another witness, who was near him, did not hear a conversation detailed by the former witness, and its relevancy is not shown, and it does not appear that the other witness did not hear such conversation, this court cannot say that the question was not properly excluded for want of relevancy.—*Cummins v. The State*, 387.
- 22a. *Same; question asking opinion of witness*—The question is also objectionable, because it asks for a mere opinion of the witness as to matters of which the jury are the judges.—*Id.*
23. *Opinion of witness; general rule; exceptions.*—It is a general rule that a witness must state facts and cannot give his opinion as to their existence; but there are exceptions to the rule, among which is, that as to matters with which the witness is specially acquainted, but cannot be specifically described, a witness may express an opinion, which the jury must take in connection with the facts on which it is based.—*Walker v. The State*, 393.
24. *Same; when witness may give opinion; weight of testimony, for the jury.*—Where the identity of wheat stolen with that found in possession of defendant is a material inquiry, the owner, who is shown to be a miller and grower of wheat for nearly thirty years, and familiar with the different varieties, may testify that when his wheat was cut early the grain had a peculiar smell, and that the wheat in question had been so cut; that the grain found in possession of defendant had the same odor as

CRIMINAL LAW—Continued.

- that in the hogshead from which the grain had been stolen; and may, therefore, give his opinion that the wheat alleged to have been stolen was part of the wheat originally in possession of the prosecutor. The weight of such testimony is for the jury to determine under all the facts and circumstances of the particular case.—*Ib.*
25. *Testimony of expert; physician.*—A physician who has had long experience in the practice of his profession, and a knowledge of the symptoms of the malady of the deceased, is competent to testify as an expert.—*Mitchell v. The State*, 417.
 26. *Same; what will impair, though not render such testimony inadmissible.*—Where the physician testified that "he would not have come to the conclusion that the symptoms of the sickness and the death of deceased was caused by poison by arsenic, if he had not heard that there was arsenic in the house"—the force of his testimony would be much impaired by such acknowledgment, though it would still be admissible, and for the jury to decide whether it should influence their verdict.—*Ib.*
 27. *Confession; when not voluntary.*—Where the prosecutor as a witness testifies that he met defendant after his house had been broken into (a chair, among other things, having been taken therefrom) and said to him "you had better return the chair," and defendant replied that "he would," the witness stating that he offered no inducement or promise or threats to defendant—*held*, that said confession of prisoner was not voluntary, and should have been excluded.—*Lacey v. The State*, 385.
 28. *What proof necessary to justify conviction; circumstantial evidence; inference from suspecting another party of the deed.*—To justify conviction the evidence must exclude, to a moral certainty, every reasonable doubt of guilt; and where the evidence is circumstantial, the circumstances must be so connected and complete as to exclude, to a moral certainty, every hypothesis but that of guilt. If the proof comes up to this measure, the jury must convict independent of any inference from the proof that some other person has been suspected of the crime; otherwise, it is their duty to acquit, though there may be no proof that any other person is suspected.—*Childs et als. v. The State*, 349.
 29. *Evidence that another alone committed the offense.*—The defendants may show that another committed the offense instead of themselves, but such defense cannot be made out by mere unsworn declarations of such other, who was not a witness, to the effect that he committed the offense, and that the prisoners are innocent. Such evidence is mere hearsay of the most dangerous character.—*Snow et al. v. The State*, 372.
 30. *Flight, and attempt to evade justice, proof of; relevancy and effect of.*—All evasions or attempts to evade justice by a person suspected or charged with crime, are circumstances from which guilt may be inferred, if connected with other criminating facts; and though not of themselves warranting a conviction, they are relevant evidence, it being the province of the jury to determine their weight, in view of all the facts and circumstances of the case, under appropriate instructions from the court.—*Bowles v. The State*, 335.
 31. *Same.*—Flight, for which no proper motive can be assigned, and remaining unexplained, is a circumstance proper to be submitted to the jury, in connection with other criminating evidence against the accused; and where he fled after the commission of the offense, the State may introduce a requisition upon the governor of a sister State, to show how he was arrested.—*Ib.*
 32. *Bad character of deceased; when immaterial.*—Proof of the bad character of the deceased for turbulence and violence can not be received, when there was no act or conduct of the deceased, at the time of the killing, which can be illustrated by such bad character, or when there is no evidence tending to show that the killing was in self-defense; and charges based on such bad character, in such a case, are properly refused.—*Ib.*
 33. *Character; presumption as to.*—In the absence of all proof as to the character of the prisoner, it is not to be taken as either good or bad; and

CRIMINAL LAW—Continued.

- the jury can not presume that it is either the one or the other, but must base their verdict upon the evidence.—*Little v. The State*, 265.
34. *Dying declarations; what are not.*—Deceased received a cut two and a half inches in length, between the seventh and eighth ribs, and died six days afterwards. On the evening on which he received the wound he was asked what he thought of his chance of recovery, and on looking towards his attending physician was told that both he and another physician thought the wound a very serious one. The deceased said, however, that he hoped to recover. *Held*: Declaration made at this time, as to the rencountre, in which the wound was received, are not admissible as dying declarations.—*Ex parte Nettles*, 268.
35. *Same; admissibility of.*—Deceased was cut, about six o'clock in the evening, with a knife, in the lower portion of the left side, below the ribs, so that about an inch and a half of his intestines protruded, and died on the evening of the next day. Shortly after the wound was received, a physician dressed it, without expressing any opinion as to its character, and about this time deceased stated to persons in his room that "he was going to die;" that "he would die in fifteen minutes." One of these persons tried to cheer him up, but it seemed to have no effect; and another witness afterwards told deceased he would get well, but deceased "insisted all the time he would die." He made statements about the cutting and as to who did it, shortly after the wound was dressed, to the persons then present, and after expressing this opinion of his condition. *Held*: The declarations were rightly admitted as dying declarations.—*Faire v. The State*, 74.
- 35a. *Same; province of jury as to.*—To justify the admission of dying declarations, they must be made under a conviction of impending death, and must be confined to facts and circumstances immediately connected with the mortal injury. The court alone determines their admissibility; their credibility and sufficiency being matters for the jury.—*Id.*
- 35b. *Malice or motive; how proved.*—Previous malice or motive to take the life of deceased, may in general be proved against one charged with the murder; but it must be proved as a fact, and not as hearsay. It is not permissible to show that deceased, prior to the killing, had a conversation with a witness about a particular robbery, during which he spoke of the prisoner.—*Id.*
36. *Proof of guilt beyond reasonable doubt; proof that offense is not barred by lapse of time.*—To justify a conviction in a criminal case, the jury must not only be satisfied, beyond a reasonable doubt, that the defendant is guilty, but, also, that the offense charged was not committed before the period which the statute fixes as a bar to its prosecution.—*Gore et al. v. The State*, 391.
37. *Murder; what competent evidence on trial for.*—The fact that a niece of the deceased made a charge that the prisoner had insulted her, and that this was known to both parties, is competent on the trial of the prisoner for murder; but is not permissible to prove as a fact that such insult was given.—*Ex parte Nettles*, 268.
38. *Larceny by finding; proof of intent to steal.*—Guilt must be proved by evidence showing that the intent to steal accompanied the act of taking, and that the conduct of the accused showed a larcenous character from the beginning, and that, at the time of the finding, he knew, or had then the means of knowing, from marks about the property, or otherwise, who was the owner.—*Griggs v. The State*, 425.
39. *Same; felonious intent must co-exist with the finding; question for the jury.*—*Id.* 426.
40. *Confessions by one adulterer, when not evidence against the other.*—(See *Adultery*.)
41. *Charge on evidence; when properly refused.*—*Fincher v. The State*, 215.
42. *Evidence of absence or suspicion of other guilty agent; when charge on, is proper.*—*Childs et als. v. The State*, 349.
43. *Indictment against two defendants; variance.* (See *Jeopardy*.)

CRIMINAL LAW—Continued.

FEES OF SOLICITOR. See LOTTERY.

FORNICATION.

44. Agreement to commit; not a conspiracy.—(See *ante*, 15.)

HARD LABOR FOR THE COUNTY. See VERDICT, JUDGMENT, &c., post, 133.

HOMICIDE. See MURDER, &c.

INDICTMENT.

45. A criminal intent must be accompanied by an act, in furtherance of it, before it can become the subject of an indictment.—*Miles et al. v. The State*, 390.
46. *Indictment; what does not vitiate.*—An indictment is not vitiated because the character & is used instead of the word *and*.—*Pickens v. The State*, 364.
47. *Grand jury; what will not invalidate findings of.*—The findings of a grand jury are not invalidated, because the record of its organization does not show that it was ascertained whether any of the grand jurors had, during the preceding twelve months, served as grand or petit jurors.—*Moses v. The State*, 117.
48. *Service of copy of indictment and list of jurors; presumption.*—In the absence of any objection in the court below, or any thing in its records showing the contrary, it will be presumed that a copy of the indictment and list of jurors were duly served upon the prisoner before trial, as required by law.—*Mitchell v. The State*, 417.
49. Indictment against two defendants; variance; jeopardy.—(See *Jeopardy*.)
50. *Indictment for larceny; when imperfect.*—A count, in an indictment for larceny, which charges that the defendant "feloniously took and carried a bale of lint cotton," omitting the word "away," is bad.—*Rountree et als. v. The State*, 381.
51. *Ownership; when property laid in railroad company.*—If cotton is delivered to a railroad company for transportation, such company is thereby vested with special property in it, and, in an indictment for its larceny, it would be sufficient to lay the property in such company.—*Id.*
52. *Description of an animal stolen.*—It is no objection where the animal stolen was a "pig," that it should be alleged in the indictment as a "hog."—*Washington et al. v. The State*, 355.
53. *Nol. pros. to one of several counts of indictment; when not error.*—Where an indictment contains two counts the court may allow the solicitor, though demurrer is interposed by defendant, to enter a *nol. pros.* to one of said counts, and not pass upon the demurrer—re-affirming *Wooster v. The State*, 55 Ala. 217.—*Lacey v. The State*, 385.

INTEMPERATE PERSONS. See RETAILING SPIRITUOUS LIQUORS, post, 110.

JEOPARDY.

54. *Indictment against two defendants; variance; jeopardy.*—If an indictment charges that two defendants committed one and the same offense, at the same time, they can not be convicted on proof showing that each committed the offense charged, at different times. And when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment, and is entitled to a verdict of acquittal of that offense.—*McGehee v. The State*, 360.

JUROR AND JURY.

55. *Grand jury; what will not invalidate findings of.*—The findings of a grand jury are not invalidated because the record of its organization does not show that it was ascertained whether any of the grand jurors had, during the preceding twelve months, served as grand or petit jurors.—*Moses v. The State*, 117.

CRIMINAL LAW—Continued.

56. *Service of copy of indictment and list of jurors; presumption.*—In the absence of any objection in the court below, or anything in its records showing the contrary, it will be presumed that a copy of the indictment and list of jurors were duly served upon the prisoner before trial, as required by law.—*Mitchell v. The State*, 417.
57. *Challenge of petit juror for cause; what not ground.*—That a juror is first cousin to the prosecuting attorney is no ground of challenge for cause.—*Washington et al. v. The State*, 355.
58. *Oath to petit jury; what sufficient recital; presumption.*—A recital in the judgment entry that the "jury being duly sworn according to law, the issue well and truly to try, and a true deliverance make, say upon their oaths," &c., is sufficient. The presumption is that the correct oath was administered, when it appears that the jury was sworn, unless it also appears that a substantially different or defective oath was administered (sustaining Walker's case, 49 Ala. 370; McCall's case, Ib. 40; Crist's case, 21 Ala. 149, 150; Blair's case, 52 Ala. 344; DeBardelaben's case, 50 Ala. 180; Moore's case, 52 Ala. 424; Bush's case, Ib. 13; McNeill's case, 47 Ala. 503; Edward's case, 49 Ala. 334; Atkins' case, in MS.; McGuire's case, 37 Ala. 161; and overruling Johnson's case, 47 Ala. 31 and 62; Smith's case, Ib. 545; same, 53 Ala. 486; and Murphy's case, 54 Ala. 178.)—*Mitchell v. The State*, 417.
59. *Same; sufficient recital of.*—A recital in the judgment entry, that thereupon came, &c., "who, being duly elected, tried, and sworn, well and truly to try the issue joined between the State of Alabama and the prisoner at the bar, on their oaths say," &c., held insufficient and a reversal entered; but upon further consideration by the court the sufficiency of such recital is sustained upon the authority of former decisions.—*Pickens v. The State*, 364.
60. *Swearing of jury; failure of record to show.*—Where the record fails to show that the jury were sworn, a judgment of conviction will be reversed.—*Lacey v. The State*, 385.
61. *Examination of witness by jury; discretion of court.*—Where the jury, after retirement, disagree as to the testimony of a witness, it is within the sound discretion of the court to allow them to return and examine the witness in the presence of the court, as to what he had previously testified, and the exercise of this discretion will not be reviewed on appeal.—*Powell v. The State*, 362.
62. *Complicity of witness as affecting his credibility; determined by the jury.*—*Moses v. The State*, 117.
63. *Province of the jury as to circumstantial evidence.*—*Childs et al. v. The State*, 349.)
64. *Province of the jury as to dying declarations.*—*Faire v. The State*, 74.

LARCENY.

65. *Larceny of money paid by mistake; what necessary to constitute.*—Where A. owed B. two dollars, and, in paying him, made a mistake and gave him a one dollar bill, and a ten dollar bill, thinking the latter was a one dollar bill, and B. appropriated the money so overpaid, after discovering the mistake made by A.,—*held*, to constitute larceny in B., he must have known, at the very time he received the money, that he was receiving more than was intended for him, and must then have intended to convert the same to his own use—this would be a fraud amounting to larceny.—*Bailey v. The State*, 414.
- 65a. *Same; what amounts to only a civil tort.*—If the testimony fails to show the intent to convert the money at the time of overpayment, beyond a reasonable doubt, then he is guilty only of a civil tort—trover and conversion.—*Ib.*
66. *Larceny by finding; what constitutes.*—Where one was charged with the larceny of a sack of coffee picked up or found by him in a public road—*held*, that if the defendant feloniously took and carried away the sack of coffee from the public road, knowing when he took it, or having imme-

CRIMINAL LAW—Continued.

- diate means of ascertaining or finding out, who the owner was, he is guilty of larceny.—*Griggs v. The State*, 425.
67. *Same*.—The finder of an article lost on a highway has a right to it against everybody except the true owner, and may take and carry it away, and a subsequent appropriation of it by him is not larceny, though he may then know the owner; but if he takes it, even from a highway, *animo furandi*, with the intent to steal it at the time of the taking, he is guilty of larceny.—*Ib*.
68. *Same; proof of intent to steal*.—Guilt must be proved by evidence showing that the intent to steal accompanied the act of taking, and that the conduct of the accused showed a larcenous character from the beginning, and that, at the time of the finding, he knew, or had then the means of knowing, from marks about the property, or otherwise, who was the owner.—*Ib*.
69. *Same; finding in a highway distinguished from finding under other circumstances*.—A distinction is made between cases of finding an article dropped in a *highway*, or other place in which it is manifestly *lost*, and a place in which it is unintentionally left or dropped by the owner—for, if there be no such evidence indicating to the finder, at the time of the taking of the chattel, to whom it belonged—if he did not otherwise know it—the law presumes the taking was innocent and lawful.—*Ib*.
70. *Same; duty of finder*.—If the finder of lost goods knows the owner, or, from the facts and circumstances attending the finding, or, from his previous acquaintance with the goods, or from marks or other *indicia* on them, he has the immediate means of ascertaining the owner, it is his duty, legal and moral, to restore them to the rightful owner, and not to appropriate them absolutely to his own use, for if he does so appropriate them he is guilty of larceny.—*Ib*.
71. *Place of finding; material to what extent*.—The place of finding is material only in determining whether the goods are *lost*, or *mis-laid*, or *left by mistake* of the owner under circumstances which would enable him to return for them.—*Ib*. 426.
72. *Felonious intent must co-exist with the finding; question for the jury*.—If, at the time of the finding, the felonious intent does not exist, though there may be a subsequent concealment of the goods, or a denial of all knowledge of them and a fraudulent appropriation of them, it is not larceny. Whether the criminal intent co-existed with the finding is a question for the jury, to be ascertained by a careful examination of the facts and circumstances attending and immediately following the finding.—*Ib*.
73. *Larceny committed in any place; character of taking; when not changed*. Larceny may be committed in any place, public or private, in a highway, or in the dwelling of the owner; and the approved definition of larceny as given by Mr. East (2 East, P. C. 553), is applicable as well to goods lost as to any other, and the place where the goods are found is immaterial, because such definition extends to the taking and carrying away of goods "from any place." The owner is not, by the loss at any place, divested of the right of property, which right draws to it constructively the right of possession.—*Ib*.
74. *Trespass as an ingredient; distinction between taking by finding and by trespass*.—The finder of lost goods does not commit a trespass in taking possession of them; there is no violation of the owner's right of property nor invasion of his possession. Larceny generally includes a trespass, but every trespass is not larceny, and whether it amounts to larceny depends upon the intent at the time, or on the subsequent conversion. If possession is obtained by a trespass it is not material whether the *animo furandi* then existed or was subsequently formed, while if possession be obtained by finding, the intention to steal must exist at the time of the finding.—*Ib*.
75. *Charges; when properly refused—proof sufficient to convict*.—Where the defendant asked charges founded on the idea that to make the defendant

CRIMINAL LAW—Continued.

- guilty of larceny "he must, at the time of taking the sack of coffee, have known who the owner was; or, there must have been *marks upon it*, by which he could then be known,"—*held*, that such charges state the principle—in the second condition—too narrowly, and are, therefore, properly refused. The defendant may be found guilty—other things being sufficiently proved—if he has the present means of knowing who the owner is, or if, when he takes the goods into his hands, he sees about them any marks, or otherwise learns any facts, by which he knows who the owner is.—*Ib.* 425.
76. *Same; what erroneous.*—A charge to the jury that if they believe that "a bale of cotton was dropped from the cars of the M. & E. R. R., and that defendants took and carried away said bale of cotton with intent to convert it to their own use, and not with the intent of returning it to the true owner, they are guilty of larceny," is erroneous, because it ignores the question of felonious intent, without which there can be no larceny.—*Rountree v. The State*, 381.
77. *Circumstances tending to show the owner of goods found.*—Where a bale of cotton had been compressed for shipment, and was found on a railroad track, where there was no crossing—this, unexplained, would tend to show that it must have fallen from the train, and that the finder could easily ascertain who had the special property in it.—*Ib.*
78. *Circumstances constituting larceny distinguished from trespass; felonious intent.*—It is not every wrongful taking and carrying away, or conversion, that constitutes larceny. Unless the circumstances which surround or attend the act, convince the jury that the intent was felonious, then the act is but a civil wrong. Secrecy in acquiring the goods, attempts at concealment, false denial of possession, are among the evidences which distinguish larceny from trespass.—*Ib.*
79. *Taking goods mislaid or left by mistake; when larceny.*—The taker of goods mislaid or left by mistake, is guilty of larceny by an appropriation or conversion of them to his own use, whether the intent to steal was formed at the time of, or subsequent to the taking.—*Griggs v. The State*, 426.
80. *Indictment; when imperfect.*—A count, in an indictment for larceny, which charges that the defendant "feloniously took and carried a bale of lint cotton," omitting the word "away," is bad.—*Rountree et al. v. The State*, 381.
81. *Ownership; when property laid in railroad company.*—If cotton is delivered to a railroad company for transportation, such company is thereby vested with special property in it, and, in an indictment for its larceny, it would be sufficient to lay the property in such company.—*Ib.*
82. *Opinion of witness as to article stolen; expert, Walker v. The State*, 393.
83. *Description of animal stolen.*—It is no objection where the animal stolen was a "pig," that it should be alleged in the indictment as a "hog."—*Washington et al. v. The State*, 355.
84. *Indictment for robbery; when will support conviction for larceny.* (See Robbery).
85. *Punishment for petit larceny; when not error for court to fix the measure of.* Under section 4361 of the Code of 1876, providing for the punishment of petit larceny, it is not error for the court to fix the measure of punishment by imprisonment in jail, when the jury return a verdict of guilty of petit larceny; the discretion of the jury provided for in said section relates to the matter of superadding a money fine.—*Lacey v. The State*, 385.
86. *Slandorous charge of larceny* (See *Slander*, 1.)

LIMITATION OF PROSECUTION.

87. *Proof of guilt beyond reasonable doubt; proof that offense is not barred by lapse of time.*—To justify a conviction in a criminal case, the jury must not only be satisfied beyond a reasonable doubt, that the defendant is guilty, but, also, that the offense charged was not committed before the

CRIMINAL LAW—Continued

period which the statute fixes as a bar to its prosecution.—*Gore et al. v. The State*, 391.

LOTTERY.

88. *Solicitor's fee for conviction for selling lottery ticket; what law governs.*—On indictment under § 4445 of the Code, in the form prescribed "for setting up or being concerned in a lottery," &c., a conviction may be had for the illegal sale of a lottery ticket on behalf of the manager, and the solicitor's fee may be taxed under that section; but where departing from the Code form, the indictment, or count remaining after a *nolle pros.*, pursues the language of a subsequent statute (now § 4446 of Code) making it a specific offense "to act for, or represent any other person in disposing of" a lottery ticket, it is an election to proceed under the latter statute, and on conviction, the solicitor's fee must be taxed under it, though both offenses are punished alike.—*Ex parte Tompkins*, 71.

MANACLING PRISONER. See TRIAL, POST, 117.

MARRIAGE. See MISCEGENATION.

MISCEGENATION.

89. *Marriage and adultery between the races; constitutional law; § 4189 of Code, validity of.*—Section 4189 of the Code, which makes it an offense for a white person and negro to intermarry, and inflicts upon persons of the different races living together in adultery, equal, though severer punishment than where that offense is committed by persons of the same race,—is a valid law of this State, and not violative of the Constitution or laws of the United States. (Overruling *Burns v. The State*, 48 Ala. 195).—*Green v. The State*, 190.
90. *Marriage; power of State over.*—Marriage is not a mere contract, but a social or domestic institution, upon which are founded all society and order, to be regulated and controlled by the sovereign power for the good of the State; and the several States of the Union, in the adoption of the recent amendments to the constitution of the United States, designed to secure to citizens rights of a civil or political nature only, did not part with their hitherto unquestioned power of regulating, within their own borders, matters of purely social and domestic concern.—*Ib.*

MISDEMEANOR. See ATTEMPT, &c.—CONSPIRACY—PENAL STATUTE.

MURDER—MANSLAUGHTER—SELF-DEFENSE.

91. *Section of the Code defining murder; erroneous charge.*—The section of the Code (R. C. § 3653; Code of 1876, § 4295), defining or enumerating instances of murder in Alabama, covers the whole field of murder, and clearly asserts that the crime, when attended with any of the enumerated circumstances, falls within the *first degree*, and every murder not attended with some of these enumerated circumstances, falls within the *second degree*. Hence a charge stating that, "These are only instances of murder in the first degree, and the crime is not limited to a killing under these enumerated circumstances," is erroneous.—*Judge v. The State*, 406.
92. *Same; common-law murder not changed under our statute.*—While our statutes have classified murder, they have, in no instance, reduced a common-law murder to a lesser offense; and every murder at common law is still murder under our statute.—*Ex parte Nelles*, 263.
93. *Same; what constitutes.*—Where a party enters into a contest dangerously armed, and fights under an undue advantage, though mutual blows pass, it is not manslaughter, but murder, if he slays his adversary pursuant to a previously formed design, either special or general, to use his weapon in a case of emergency.—*Ib.*
94. *Erroneous charge, ignoring essential elements of murder.*—A charge assert-

CRIMINAL LAW—Continued.

- ing that, "When an assault is made, and resistance or a striking back is justified, yet, even here, when the striking back or resistance is made with a deadly weapon, and the weapon used in a very cruel manner, not justified by the nature and danger of the assault, the offense amounts to murder," is erroneous, because it ignores the nature of the assault resisted, the reasonable probability of escape by retreat, the heat of blood likely to be engendered by an assault, the question of cooling time, and the inquiry of a "formed design," without which there can be no murder under the facts postulated in such charge.—*Judge v. The State*, 406.
95. *Homicide in resenting an assault; when manslaughter; when murder.*—A homicide committed in undue resentment of an unlawful assault or battery, if done in the heat of blood caused thereby, before cooling time, and without previously formed design, is but manslaughter; yet if one who is assaulted, under cover of such assault as a pretext, pursuant to a "formed design," and not in reasonable defense of himself from grievous bodily harm, nor while dethroned of his reason by passion engendered by such assault, slay his opponent with a deadly weapon, it is murder.—*Ib.*
96. *Same; murder; self-defense; manslaughter.*—Death by excessive resistance of an assault, even when cruel, is not always murder. If indicted pursuant to a formed design, if there be other satisfactory evidence of premeditation, then it is murder. On the other hand, if the resistance be not greatly disproportioned to the assault, and death ensue by misadventure, this is self-defense. If the resistance be excessive, and the fatal blow be inflicted in the heat of blood, although with a deadly weapon, and there be no evidence of previous malice, formed design, or of such deliberation as to show that reason held sway, it is manslaughter.—*Ib.*
97. *Cases cited by Mr. Bishop, held not to sustain his theory.*—The court refers to the adjudged cases cited by Mr. Bishop (Craton's case, 6 Ire. 164; Curry's case, 1 Jones' Law, 280; Scott's case, 4 Ire. 409; Hayward's case, 6 Carr. & P. 157; Shaw's case, Ib. 372; Thomas' case, 7 Ib. 817; King's case, 2 Va. Cas. 78; Lynch's case, 5 Carr. & P. 324), in support of the principle which constitutes the charge in consideration, and does not think they sustain the principle announced by Mr. Bishop, in support of which they are cited—such principle postulating too little as a guide for a jury—the court holding, that while murder may be committed under the circumstances laid down by Mr. Bishop, and contained in the said charge, yet such killing is not necessarily murder.—*Ib.*
98. *Homicide reduced to manslaughter; murder; questions for jury; words will not extenuate homicide.*—It is the frailty of human passion, suddenly excited by sufficient provocation to an unpremeditated act of violence, which tones homicide down to manslaughter; while calculation, deliberation, formed design, contrivance, brutality, are characteristics of murder; and these are always questions for the jury, under appropriate instructions. Mere words, no matter how insulting, never reduce a homicide to manslaughter.—*Ib.*
99. *Same; principle laid down in Field's case.*—An affray may occur, or sudden provocation be given, which, if acted on in the heat of passion produced thereby, might mitigate homicide to manslaughter; yet if the provocation, though sudden, be not of that character which would, in the mind of a just and reasonable man, stir resentment to violence, endangering life, or if "cooling time" had intervened, the killing would be murder. Such homicide may also be attended with evidence of express malice—as preparation for the killing, the weapon employed, &c. (Approving Field's case, 52 Ala. 348.)—*Ib.* 407.
100. *Matters to be observed in charging the jury.*—In charging a jury, respect should be had to the evidence; and instruction should be given on every hypothesis of fact, which the testimony may tend to support. The court remarks, that "we are pleased to observe, that in this case the old, sound, and much disregarded doctrine, that 'no man stands excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat,' has been given in charge, and must have been acted on by the jury."—*Ib.*

CRIMINAL LAW—Continued.

101. *Negligence of wounded man or nurses; when immaterial.*—Where death is caused by a dangerous wound, the person inflicting it is responsible for the consequences, though the deceased might have recovered with the exercise of more prudence and with better nurses; and a charge is properly refused which instructs the jury, without regard to the character of the wound, that the prisoner can not be convicted of murder, although the wound was inflicted with malice aforethought, pursuant to a formed design to kill, &c., if the wounded person died from the gross carelessness of himself or nurses.—*Bovoles v. The State*, 355.
102. *Murder; what competent evidence on trial for.*—The fact that a niece of the deceased made a charge that the prisoner had insulted her, and that this was known to both parties, is competent on the trial of the prisoner for murder; but is not permissible to prove as a fact such insult was given.—*Ex parte Nettles*, 268.
103. *Questions not noticed in detail; affirmed on authorities.*—The questions presented in argument are not considered in detail. The judgment of conviction is affirmed and reference made to *Ex parte Winston*, 52 Ala. 419; *Floyd v. The State*, December Term, 1876; *Craton's case*, 6 Ire. 164; *Boots Coleman v. The State*, present term.—*Young et al. v. The State*, 379.
104. *Malice; how proved.*—*Psire v. The State*, 74. (See *Evidence*, 35b.)
105. *Dying declarations.*—(See *Evidence*, 34–35a.)

NEW TRIAL.

106. *Case in fieri; when arrest of judgment, and new trial awarded.*—Where a trial is had, and a verdict of guilty rendered, but no judgment pronounced, the case is still *in fieri*, and under the control of the court; and where erroneous rulings, prejudicial to the defendants, appear from bill of exceptions duly filed, the court below should, at the next term, award a new trial.—*Gore et al. v. The State*, 391.

NEGRO. See MISCEGENATION.

NOLE PROSEQUI. See TRIAL AND ITS INCIDENTS, 119, 120.

OATH. See JUROR AND JURY, ante, 58, 59.

PENAL STATUTE.

107. *Penal statute; no conviction for violating policy of.*—Penal laws are not, by construction, made to embrace cases not plainly within their meaning. One can not be convicted for doing an act which contravenes the mere policy of a penal statute.—*Young v. The State*, 358.

PUNISHMENT. See VERDICT, &c., post, 134.

RAPE. See CARNAL ABUSE.

RETAILING SPIRITUOUS LIQUORS.

108. *Statute on retailing not repealed by revenue law.*—Section 3618 of the Revised Code, prohibiting the retailing of spirituous liquors without license, is not repealed by the Revenue Act of 1868, punishing "engaging in, or carrying on, the business of retailing" without license.—*Sanders v. The State*, 371.
109. *Retailing without license, one act sufficient; not so with "engaging in business," &c.*—Under an indictment for retailing without license, a single act of unlawful retailing will sustain a conviction, while the "engaging in or carrying on the business of retailing," is a different offense, and requires more evidence.—(See *Martin's case*, present term.)—*Id.*
110. *Selling liquor to intemperate person; what not within the statute.*—Where the defendant received a dollar from one B., whom he knew to be a person of intemperate habits, and under B.'s promise that he (defendant) was to have any surplus of the money, went and purchased of a liquor

CRIMINAL LAW—*Continued.*

dealer a bottle of whiskey and delivered it to B.—*Held*, that this was neither a selling nor giving of liquor to B. by defendant, and was not within the terms or contemplation of the statute.—Code of 1876, § 4205.—*Young v. The State*, 358.

REVENUE LAW; VIOLATIONS OF.

111. *Revenue law; subdivision 15 of § 194 of Code, construed.*—Subdivision 15 of § 194 of the Code of 1876, defining certain occupations for the carrying on of which license is required, which reads as follows: "For dealers in pistols, bowie knives and dirk knives, whether the principal stock in trade or not, fifty dollars," when construed in connection with that section, was manifestly intended to impose a tax on each dealer in pistols, or in bowie knives, or in dirk knives, and not merely on a dealer in all of these articles.—*Porter & Co. v. The State*, 66.
112. *Same; want of license; on whom lies burden of proving.*—In a prosecution under this law, the State having proved the carrying on of a business which was unlawful without a license, it devolves on the defendants to show that they had taken out such license; and on their failure to do so, conviction is proper, though there is no affirmative proof on the part of the State that defendants had no license.—*Id.*
113. *Statute on retailing not repealed by revenue law.*—Section 3618 of the Revised Code, prohibiting the retailing of spirituous liquors without license, is not repealed by the Revenue Act of 1868, punishing "engaging in, or carrying on, the business of retailing without license.—*Sanders v. The State*, 371.
114. *Retailing without license, one act sufficient; not so with "engaging in business," &c.*—Under an indictment for retailing without license, a single act of unlawful retailing will sustain a conviction, while the "engaging in or carrying on the business of retailing," is a different offense, and requires more evidence (See *Martin's case*, present term.)—*Id.*

ROBBERY.

115. *Robbery; indictment for; when will support conviction for larceny.*—There may be a conviction for grand larceny, on an indictment for robbery, if the felonious taking of goods of sufficient value be shown, unaccompanied by the aggravating circumstances necessary to constitute robbery.—*Allen v. The State*, 98.

SELF-DEFENSE. See MURDER, &c.

TRIAL AND ITS INCIDENTS.

116. *Presence of prisoner during trial; sufficient showing in judgment entry.*—When the record discloses that the trial, verdict, imposing sentence, and rendition of judgment, was a continuous transaction, at all parts of which the defendants were personally present, and it is expressly stated that on the return of verdict of guilty, the defendants were in court and were each asked if he had anything to say why the sentence of the law should not be pronounced, &c., it sufficiently appears that the prisoners were personally present during all the stages of the trial, and also when sentence was passed and when judgment was rendered.—*Shaw et al. v. The State*, 372.
117. *Shackling prisoner on trial; rule as to.*—It requires an extreme case to justify shackles or manacles on a prisoner undergoing trial; but whether or not this is necessary, must be left to the enlightened and conscientious discretion of the lower court, in view of all the circumstances of the particular case; and the exercise of that discretion can not be reviewed on appeal.—(BRICKELL, C. J., dissenting on this point.)—*Faire v. The State*, 74.
118. *Indictment against two defendants; variance; jeopardy.*—If an indictment charges that two defendants committed one and the same offense, at the

CRIMINAL LAW—Continued.

- same time, they can not be convicted on proof showing that each committed the offense charged, at different times. And when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment, and is entitled to a verdict of acquittal of that offense.—*McGehee v. The State*, 360.
119. *Nolle prosequi; when not authorized; reversal.*—The provisions of section 4187 of the Code of 1876, do not, in such cases, authorize a *nol. pros.* as to one of the defendants, so that the case may proceed against the other. If a *nol. pros.* be so entered against the objection of the remaining defendant, who is convicted, the conviction will be reversed.—*Ib.*
120. *Nol. pros. to one of several counts of indictment; when not error.*—Where an indictment contains two counts the court may allow the solicitor, though demurrer is interposed by defendant, to enter a *nol. pros.* to one of said counts, and not pass upon the demurrer—re-affirming *Wooster v. The State*, 55 Ala. 217.—*Lacey v. The State*, 385.
121. *Refusal to pass on evidence, and discharge co-defendant.*—Where there was some evidence tending to show that a co-defendant was a participant in the commission of the offense, its sufficiency being a question for the jury—whether he was an accomplice, being one of the questions—the court properly refused to pronounce criminalizing evidence unworthy of belief, and order such prisoner's discharge on the ground that there was not sufficient evidence to convict him.—*Washington et al. v. The State*, 355.
122. *Duty of the judge in admitting or excluding evidence.*—It is the duty of the presiding judge, if satisfied that he has illegally admitted or excluded evidence, to correct the error during the trial by withdrawing from the jury evidence improperly admitted, or by admitting evidence improperly excluded, and such action of the court is not error if its final ruling is correct.—*Snov et al. v. The State*, 372.
123. When case still in fieri.—(See *New Trial*).

VERDICT—JUDGMENT—SENTENCE.

124. *Penal statute; no conviction for violating policy of.*—Penal laws are not, by construction, made to embrace cases not plainly within their meaning. One cannot be convicted for doing an act which contravenes the mere policy of a penal statute.—*Young v. The State*, 358.
125. Verdict of acquittal, when defendant entitled to.—*McGehee v. The State*, 360.
126. What proof necessary to justify conviction.—*Childs et al. v. The State*, 349; *Gore et al. v. The State*, 391.
127. *Oath to petit jury; sufficient recital of.*—A recital in the judgment entry, that thereupon came, &c., "who, being duly elected, tried, and sworn, well and truly to try the issue joined between the State of Alabama and the prisoner at the bar, on their oaths say," &c., held insufficient and a reversal entered; but upon further consideration by the court the sufficiency of such recital is sustained upon the authority of former decisions.—*Pickens v. The State*, 364.
128. *Same; presumption.*—A recital in the judgment entry, that the "jury being duly sworn according to law, the issue well and truly to try, and a true deliverance make, say upon their oaths," &c., is sufficient. The presumption is that the correct oath was administered, when it appears that the jury was sworn, unless it also appears that a substantially different or defective oath was administered (sustaining Walker's case, 49 Ala. 370; McCallar's case, *Ib.* 40; Crist's case, 21 Ala. 149, 150; Blair's case, 52 Ala. 344; DeBardelaben's case, 50 Ala. 180; Moore's case, 52 Ala. 424; Bush's case, *Ib.* 13; McNeill's case, 47 Ala. 503; Edward's case, 49 Ala. 334; Atkins' case, in MS.; McGuire's case, 37 Ala. 161; and overruling Johnson's case, 47 Ala. 31 and 62; Smith's case, *Ib.* 545; same, 53 Ala. 486; and Murphy's case, 54 Ala. 178.)—*Mitchell v. The State*, 417.
129. *Swoering of jury; failure of record to show.*—Where the record fails to show that the jury were sworn, a judgment of conviction will be reversed.—*Lacey v. The State*, 385.

CRIMINAL LAW—Continued.

130. *Presence of prisoner during trial; sufficient showing in judgment entry.*—When the record discloses that the trial, verdict, imposing sentence, and rendition of judgment, was a continuous transaction, at all parts of which the defendants were personally present, and it is expressly stated that on the return of verdict of guilty, the defendants were in court and were each asked if he had anything to say why the sentence of the law should not be pronounced, &c., it sufficiently appears that the prisoners were personally present during all the stages of the trial, and also when sentence was passed and when judgment was rendered.—*Snow et al. v. The State*, 372.
131. *Question to prisoner, "whether he has anything to say," &c.; recital of the record; when case not reversed.*—Before sentence, on conviction of felony, the prisoner must be asked if he has anything to say why the sentence of the law should not be pronounced upon him. The main purpose of the inquiry is to allow the prisoner an opportunity to make any motion which will prevent judgment; hence, where the record shows that after verdict, the defendant moved in arrest of judgment and for a new trial, such recital shows that the defendant got the benefit of the rule, and that the question must have been, in substance, propounded to him.—*Spigner v. The State*, 421.
132. *When case in fieri between verdict and judgment.*—(See *New Trial*).
133. *Judgment imposing hard labor for costs; what should be specified.*—Judgments imposing hard labor for the county for payment of costs, should specify the precise amount, and the number of days the defendant is to serve for their payment, and the sum allowed for each day's service; but judgments imposing such hard labor at a certain rate until the costs are paid, without specifying the number of days or amount of costs, have been too often sanctioned by this court for them to be now held erroneous.—*Walker v. The State*, 393.
- 133a. *When judgment should be arrested and new trial granted.*—(See *New Trial*.)
134. *Punishment for petit larceny; when not error for court to fix the measure of.* Under section 4361 of the code of 1876, providing for the punishment of petit larceny, it is not error for the court to fix the measure of punishment by imprisonment in jail, when the jury return a verdict of guilty of petit larceny; the discretion of the jury provided for in said section relates to the matter of superadding a money fine.—*Lacey v. The State*, 385.

WITNESSES IN CRIMINAL CASES.

135. *Competency of witness; when wife may testify.*—The wife of one not on trial or indicted, is not incompetent to testify against defendants because her husband had also testified and his testimony tended to show him an accomplice of defendants.—*Powell v. The State*, 362.
136. *Same.*—The wife of a person who was at one time charged with the murder, for which the prisoner alone is indicted and tried, is a competent witness on the trial to testify to facts exculpatory of the husband, whom the defense sought to prove the guilty agent in the murder.—*Fincher v. The State*, 215.
137. *Impeaching or sustaining witness; predicate.*—Where a witness had answered affirmatively to the question, whether he knew the general character of another witness, such question and answer was a sufficient predicate to allow the former witness to testify to the good character of the latter who had been attempted to be impeached.—*Childs et als. v. The State*, 349.
138. *Cross-examination; proper question.*—It is not error, on cross-examination, to ask a witness, for the purpose of affecting his credibility, "if he had not pleaded guilty of stealing from a store," in a certain place—the trial referred to having been before a justice of the peace, and it was not shown that any record was made of it.—*Id.*
139. *Witness for prosecution; credibility of, how may be assailed.*—The credi-

CRIMINAL LAW—*Continued.*

- bility of a witness for the prosecution may be assailed, by proof of hostility to the prisoner, or other motive, which may be fairly presumed to bias the witness in favor of the State and against the prisoner; and although the witness admits such hostility or bias, the prisoner has the right, on cross-examination, to draw out particular declarations, that the jury may determine the extent and malignity of such hostility.—*Fincher v. The State*, 215.
140. *Same.*—The proper predicate having been laid, it is error not to allow the prisoner to ask a witness for the State, on cross-examination for the purpose of assailing his credit, whether the witness had not stated he would give a sum of money to have the prisoner killed.—*Id.*
141. *Accomplice; when conviction may be had on uncorroborated testimony of.* Under our present statutes, a conviction for a felony can not be had on the uncorroborated testimony of an accomplice; but in misdemeanors, the jury may convict on his uncorroborated evidence, if they credit him.—*Mose v. The State*, 117.
142. *Same.*—It is for the jury to determine from the facts and circumstances of the case, how far the complicity of the witness in the offense affects his credibility in misdemeanors, and where the offense is mere *malum prohibitum*, a charge that the witness' complicity in it detracts "very materially" from his credibility, is erroneous and properly refused.—*Id.*
143. *Examination of witness by jury; discretion of court.*—Where the jury, after retirement, disagree as to the testimony of a witness, it is within the sound discretion of the court to allow them to return and examine the witness in the presence of the court, as to what he had previously testified, and the exercise of this discretion will not be reviewed on appeal.—*Powell v. The State*, 362.

CUSTOM AND USAGE. See COMMON CARRIERS, 2—SALES, 2, 8.

DAMAGES.

1. *Breach of contract by lessee of saw-mill, measure of damages; erroneous charge.*—The measure of damages in a suit by a mill owner against one to whom he had leased it, upon defendant's agreement to run it at his own expense, and pay one-fourth of the lumber sawed—the breaches alleged being the failure to run the mill at its capacity, and allowing it to remain idle for some time, and injuring it by unskilful and negligent use, etc.; the injury which results proximately from the breaches, and the facts being ascertained, the law, and not the contemplation of the parties, fixes the measure of damages; hence, it is error to charge the jury, in such a case, that "the damages must be such as both parties reasonably contemplated at the time of making the contract."—*Collins v. Stephens*, 543.
2. *Same; conflicting testimony; when case not made out by plaintiff; what a proper charge.*—In such a case, where damages are sought to be recovered for injuries to the mill, by reason of its negligent and unskilful use by defendant (two witnesses testifying on this point), it is not error to charge the jury that "if one witness swears the mill was damaged more than by ordinary wear and tear, and the other swears it was not, and both witnesses are of equal credibility, and the jury considers them equally credible, then plaintiff has not made out his case on the question of damaging the mill."—*Id.*
3. *Damages for breach of detainee bond; what fees of counsel not recoverable.*—Fees of counsel employed to prosecute an action for breach of condition of bond given by plaintiff in detainee, are not recoverable as part of the damages the defendant may have sustained from the wrongful suit.—*Mills v. Long et al.* 458.
4. *Resisting new trial; when counsel fees recoverable.*—An application for a new trial in the original suit is a mere continuation of such suit—necessarily incident thereto—and counsel fees for resisting such application are, therefore, recoverable.—*Id.*

DAMAGES—*Continued.*

5. *Act to prevent homicides, omitted from Code; subsequent act to supply omission; remedy against corporations for acts causing death.*—The act approved February 21, 1860, entitled, "an act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted; and the act of the same title, approved February 21st, 1872, having been passed to remedy the omission; section 1941 (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death, which said sections 1938, 1939, gave against individuals, now gives the same remedy as by the amending act of 1872. — *Savannah & Memphis R. R. Co. v. Shearer*, 672.
6. *Contributory negligence; defensive matter; burden of proof.*—In an action to recover damages for a wrongful act causing death, contributory negligence on the part of the deceased is defensive matter, and the burden of proving it rests on the defendant, unless the plaintiff's own testimony inculcates the deceased. — *Id.*
7. *Punitive damages under statute; to what extent recoverable.*—The damages allowed by the statute which gives an action for a wrongful act causing death, are punitive, and are not confined to the pecuniary loss sustained by the family of the deceased by reason of his death. — *Id.*
8. *Municipal corporation; acts of; when liable in damage for ditching, &c.*—A municipal corporation does not act judicially, but its acts are administrative in the construction of ditches, &c., to drain the streets; and if in so doing it concentrates water and discharges it on adjoining lands, whereby the land is washed up and injured, it is responsible in damages for such injury. — *Mayor & Councilmen of Troy v. Coleman*, 570.
9. *Municipal corporation diverting water from streets; when liable in damages.* If the corporate authorities of a town, in diverting water from their streets, discharge it by artificial means, in increased quantities and with collected power and destructiveness, upon the lands of others, the corporation is liable for damage thus occasioned. — *Mayor, &c., of Union Springs v. Jones*, 654.
10. *Permission of former owner to erect a conduit; when purchaser no cause of action.*—If the owner of a lot gives the corporate authorities, or their employees, authority to erect a conduit, or water escape, through it, in the manner in which it exists when the lot is sold by another, the purchaser has no cause of action so long as there is no change in the structure or increase in the flow of water. — *Id.*
11. *Measure of damage to present owner; what plaintiff can not show.*—Where the purchaser is not precluded from recovering by some act of the former owner, the measure of damages is the injury to the lot after he became owner; the difference in value of the lot between the time the conduit was erected and the suit brought, is not a proper criterion of damages; nor can the plaintiff show, in the absence of the averment of special damages, that by reason of the flow of water on the lot his tenant left the premises. — *Id.*
12. *Irrelevant question.*—A question in this case, whether "the water could have any other outlet through plaintiff's lot from the street, unless the Council was to make one," is irrelevant and is properly excluded. — *Mayor, &c., of Troy v. Coleman*, 570.
13. *What good defense; rights conveyed by former owner.*—Evidence that "one of the sewers complained of, was put where it is at the request of a former owner," is admissible and is a good defense, because such former owner could not invest his alienee with greater rights than he himself had. — *Id.*
14. *Same; what will not preclude grantee from recovering damages.*—Such an injury being a nuisance, the mere fact that the former owner brought no action or made no complaint against it, will not preclude a purchaser from him of the right to recover for the damage he may suffer—if by the act of the grantor the lot had not been subjected to a servitude for an outlet to the water of which the streets should be relieved. — *Id.*
15. *Damages; what not recoverable on injunction bond.*—Attorney's fees in pro-

DAMAGES—Continued.

curing the dissolution of an injunction, and in resisting a motion to reinstate, are recoverable as part of the damages on an injunction bond, conditioned according to § 3430 of the Revised Code, but the fees paid for the after defense of the cause are not; and the rule is not different, because the bill sought the cancellation of a mortgage, and a perpetual injunction against a sale of property under it.—*Robertson v. Robertson et als.* 68.

DECEASED PERSONS.

1. *Transaction with deceased person; what does not involve.*—On an issue in such a case, as to the interest which the respective payees had in such a note, the plaintiff is a competent witness to prove the consideration of the note, who owned the property which formed that consideration, and its value; such evidence, on his part, does not involve any "transaction with, or statement by" the decedent, within the meaning of § 3056 of the Code.—*Tisdale, Ex'r v. Maxwell*, 40.
2. *Same; what constitutes.*—Any understanding between the two, by which the note was made payable to both, or by which the testator was to take certain property turned over by the makers of the note, etc., would involve a transaction with the decedent; and the plaintiff is not a competent witness, in his own behalf, to prove such facts.—*Id.*

DECISIONS OF SUPREME COURT OF UNITED STATES.

1. *Decisions of Supreme Court of the United States; when binding on State tribunals.*—In the decision of questions which may be carried for revision to the Supreme Court of the United States, this court recognizes the decisions of that tribunal as authoritative and binding.—*Wilson v. Brown et al.* 62.

DEEDS. See FRAUDULENT CONVEYANCES—MORTGAGES.

1. *Deed absolute on its face; vests legal title.*—Where A. executes a deed of lands to B., conveying, on its face, the absolute title in fee simple, the legal title passes to B., and, on his death, descends to his heirs, notwithstanding a separate agreement between A. and B., wherein B. obligated himself to allow A. to redeem within two years, on the payment by him of a debt due B., for which the deed was executed.—*Smith et al. v. Murphy et al.* 630.

DEPOSITION OF WITNESS.

1. *Deposition; motion to suppress; when too late.*—It is too late to make a motion for the first time to suppress an entire deposition, after the parties have expressed themselves ready for trial and announced satisfaction with the jury.—*Morgan v. Wing*, 301.
2. *Deposition of witness; when inadmissible.*—Where the deposition of a witness, residing outside of the State, is taken, and he afterwards comes into the court at the time of the trial, and remains at the place where it is held, his unexplained absence at the time it is proposed to introduce his evidence, although not subpoenaed by either party, will not authorize the party taking the deposition to read it; his absence not being shown to have occurred without their procurement or consent.—*Mobile Life Ins. Co. v. Walker*, 290.

DEMURRER. See CHANCERY—CONTRACTS—PLEADING AND PRACTICE, 3, 11–14.**DETINUE.**

1. The gist of the action of detinue is the wrongful detainer, and not the original taking.—*Henderson v. Fells' Adm'r*, 590.
2. *Detinue; possession in defendant necessary to maintain action of.*—To maintain the action of detinue it must be shown that the defendant, at the time the writ was sued out, had the actual possession, or the controlling

DETINUE—*Continued.*

- power, over the property, for the reason that he may surrender the possession if he elect to do so.—*Ib.*
3. *Same; when detainee properly brought.*—Where property had been taken from the possession of defendant, under a search warrant, and brought to the justice of the peace who issued the warrant, who, on hearing, discharged the seizure and directed the sheriff to restore the property to defendant, and suit in detainue was then brought, but before the property had actually reached the defendant's possession—*held*, that the defendant must be regarded as having power or control over the property, and, therefore, the suit was rightly brought.—*Ib.*
4. *Breach of detainue bond; what fees of counsel not recoverable.*—Fees of counsel employed to prosecute an action for breach of condition of bond given by plaintiff in detainue, are not recoverable as part of the damages the defendant may have sustained from the wrongful suit.—*Mills v. Long et al.* 458.
5. *Resisting new trial; when counsel fees recoverable.*—An application for a new trial in the original suit is a mere continuation of such suit—necessarily incident thereto—and counsel fees for resisting such application are, therefore, recoverable.—*Ib.*

DEVASTAVIT. See EXECUTORS AND ADMINISTRATORS.

DISCONTINUANCE. See ACTION, 2.

DISTRIBUTION OF ESTATE.

1. *Distribution; part husband takes in wife's personality; parties to bill for distribution.*—Where husband and wife sell lands of her statutory estate, taking notes for the purchase-money, her estate is thereby converted into personality, and her husband, on her death intestate, takes one-half absolutely; and where the wife's distributees seek to enforce the vendor's lien and a decree for the amount of the notes, they are not entitled to relief—though a case proper for distribution direct, without administration on the wife's estate, be shown—if the bill showing the husband survived the wife, fails to make him a party; and the objection may be raised for the first time in the appellate court.—*Marshall et al. v. Gayle, et al.* 284.
2. *Same; when distributees can not maintain bill for distribution.*—Where, in such a case, administration was had on the wife's estate, which is declared insolvent, and the administrator settles and resigns, nothing further being done in the administration, the distributees directly can not maintain such a suit; and the fact they are too poor to cause further administration or take out letters for that purpose, can not dispense with the necessity for administration, and having those interested in the estate properly before the court.—*Ib.*
3. Private act authorizing administratrix to sell land for distribution.—*Watson v. Oates*, 647.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 8, 9.

EJECTMENT.

1. *Ejectment commenced against parties in possession.*—Ejectment is a possessory action, and since it operates only on the possession, it must be commenced against the person in possession.—*Smith et al. v. Gayle*, 600.
2. *Same; defendants to action; who affected by judgment.*—If the tenant in possession is not made a defendant, he can not be ejected under a writ of *habere facias*, issued on the judgment; and if the tenant only is sued, the judgment against him is not evidence against his landlord, unless the latter was joined with the tenant in defense; but all persons who enter into possession pending the suit, are bound by the judgment; and if the landlord, not being made a defendant, receives possession, pending the suit, from the tenant, who alone is sued out, he (the landlord) may be turned out under the writ of possession.—*Ib.*

ELECTION.

1. By prosecutor, as to count of indictment.—(See *Criminal Law*, 88).
2. Of performance of alternate stipulations of contract.—(See *Contract*, 5).

ERROR AND APPEAL.

1. *Appeal in criminal case; when will be dismissed.*—An appeal does not lie in a criminal case until after judgment on the verdict, and if prematurely taken, will be dismissed that the court below may proceed.—*Gore et al. v. The State*, 391.
2. *When party may come in after final decree for the purpose of taking appeal.*—After final decree in a foreclosure suit by a mortgagee against the corporation, the court will not give a stockholder leave to become a party defendant, and allow him to make answer and defense; but he might be allowed to be made a party for the purpose of allowing him to prosecute an appeal.—*Ex parte Brown*, 537.
3. *Averment; uncertainty of; defect raised first time in Supreme Court.*—An averment in the information that the defendant "hath been, and now is, an attorney practicing in the courts of the State of Alabama, in the county of Dallas," may apply either to a licensed attorney or one without license, practicing temporarily by comity, and is for that reason uncertain in statement, and such want of certainty, being a defect of substance fatal to a judgment rendered thereon, may be raised for the first time in the appellate court.—*Thomas v. The State, ex rel. Stepney*, 365.
4. *Defect of parties, objection for; what may be raised for first time in appellate court.*—The omission of an indispensable party will cause a reversal on error, though the objection was not raised in the court below.—*McCully v. Chapman*, 325.
5. *Failure to assign errors; case affirmed.*—Where an appeal is taken to the Supreme Court, in a chancery case, the decree of the chancellor will be affirmed if there is no assignment of errors.—*Purswell v. Brooks*, 442.
6. *Reversal though no objection made below.*—This court has repeatedly held that a decree founded on a bill which does not aver facts, authorizing the court to grant relief, will be reversed on error, though no objection may have been interposed in the primary court.—*Flewellen et al. v. Crane*, 627.
7. *Decision of primary tribunal denying bail; weight to be accorded to.*—Where the decision of the primary tribunal, denying bail, is sought to be reviewed, and the correctness of its decision rests on the weighing of evidence, the appellate court can not be unmindful of the superior advantages which the lower court has, by observing the conduct and demeanor of witnesses, in determining the weight which should be attached to the testimony of the different witnesses, and will not interfere, unless it is very clear that the primary court has erred.—*Ex parte Nettles*, 268.
8. *Nolle prosequi; when not authorized; reversal.*—The provisions of section 4187 of the Code of 1876, do not, in such cases, authorize a *nol. pros.* as to one of the defendants, so that the case may proceed against the other. If a *nol. pros.* be so entered against the objection of the remaining defendant, who is convicted, the conviction will be reversed.—*McGehee v. The State*, 360.
9. *Exception to register's report; when not considered by Supreme Court.*—Where the exceptions to the report of the register do not appear to have been passed upon by the Chancellor, they cannot, for the first time, be considered in the Supreme Court.—*Bryant, Adm'r, v. Stephens et al.* 636.
10. *Error without injury; what not cause for reversal.*—Where mortgagors and their lands are bound in any event for the payment of debts to different persons, it is no injury to them to give priority to either debt; hence they can not complain of a decree condemning lands for satisfaction of a mortgage, on the ground that it erroneously gave one debt a preference over the other—although the case would, perhaps, be reversible, if a party actually aggrieved had complained.—*Bethune et al. v. Oates*, 460.

ERROR AND APPEAL—Continued

11. *Same*.—Where a cause is continued, as the judgment entry recites, "until the next term, with the express understanding that it is to be tried then, or dismissed from the docket," it may be dismissed, on motion, at the second ensuing term, notwithstanding a continuance at the intermediate term; and if a judgment of non-suit is entered, instead of dismissed, this is error without injury.—*Stewart et al. v. Ross*, 264.
12. *Judgment on demurrer; when not revisable on appeal*.—A judgment on demurrer can not be revised on appeal if it is shown only by the bill of exceptions.—*Sternau et al. v. Marz*, 608; *Tuscaloosa Scientific and Art Association v. The State, ex rel. Murphy*, 54.
13. *Same*.—Where rulings upon demurrer are not shown by any judgment-entry, the appellate court will not revise them, although the bill of exceptions recites what such rulings were.—*Morgan v. Wing*, 301.
14. *Interlocutory ruling; when no appeal from*.—*Heflin v. Rock Mills Manufacturing & Lumber Co.* 613.
15. *Charter of City of Selma providing for suits before justices, for unlawful detainer; what not cause for dismissing appeal*.—The provisions of the charter of the city of Selma, declaring the person in possession of property sold for city taxes, who refuses to deliver it to the purchaser, "shall be guilty of unlawful detainer, and the purchaser may institute suit before any justice of the peace, to recover possession," if valid, about which no opinion is expressed, are not to be construed as subjecting the proceeding, thus authorized, to the rules which regulate the action of unlawful detainer, between landlord and tenant, or where only the right of possession is involved; the proceeding authorized by the charter, partakes more of the nature of ejectment, or the statutory real action, than of unlawful detainer, and is governed by the general rules applicable to the former class of actions; and there must of necessity be an inquiry into the merits of the title; and where judgment is rendered in the justice's court against the tenant, the landlord may intervene on appeal. Where judgment is rendered against the tenant and the landlord appeals to the Circuit Court, the appeal will not be dismissed, or the cause stricken from the docket, because the tenant did not appeal; or because a bond, in compliance with the statute, was not given, if the appellant is able and willing to give a proper bond.—
16. *City Court of Selma's duty of appellate court on reviewing findings on facts*.—(See *Courts*, 1.)

EQUITABLE MORTGAGE. See **MORTGAGE**, 1.

ESTATES OF DECEDENTS. See **EXECUTORS AND ADMINISTRATORS**.

1. *Claim against decedent's estate; what necessary presentment to avoid bar of non-claim*.—A presentment which will avoid the bar of the statute of non-claim, must give such information of the existence of the claim that the personal representative may determine—assuming its validity—how far he can safely proceed in the administration of the estate as solvent. If a mere statement of the claim is relied on as a presentment, it should describe the claim with such accuracy that it may be distinguished from all similar claims.—*Bibb & Fullmer, Ex'rs, v. Mitchell, Adm'r*, 657.
2. *Same; when statement of claim insufficient*.—A statement of a claim presented by an administrator which does not show of what estate he was administrator; whether it was payable to him or his intestate; or when the note was executed; or whether the obligation was joint or several; or whether it bore interest from date, and gave no description of the claim which would distinguish it from other notes for a similar amount, payable at the same date, is not sufficient to avoid the bar of the statute of non-claim.—*Id.*
3. *Statute barring claims against estate of decedent; purpose of sections 2597 and 2598, Code of 1876*.—The provisions of §§ 2597 and 2598 of the Code

ESTATES OF DECEDENTS—*Continued.*

- of 1876, limiting the time within which claims against decedents' estates will be barred, have been of force since 1815, and have been frequently construed. The purpose of the statute was to promote a speedy, safe, and definitive settlement of estates, by giving the personal representative notice and knowledge of all claims against the estate in his hands. These, and other patent results of the statute, go to make up a policy to which it is the duty of courts to give full effect.—*Smith v. Fellows, Adm'r*, 467.
4. *Same*; *what sufficient presentation of claim.*—To constitute a sufficient presentation of a claim, under the statute, the nature and amount of the claim must be brought to the attention of the personal representative by some one authorized to make the presentation, and the representative must be notified expressly or impliedly that the estate is looked to for payment. Less than this does not meet the purpose of the statute. *Ib.*
 5. *Same*; when the claim is an open account or legal liability, it should be reduced to writing, and be so presented. Less than this would not be sufficient information for the representative to base action upon. (*Affirming Bigger v. Hutchings*, 2 Stew. 445.)—*Ib.*
 6. *Same*; *provision of § 2599; what inquiry not unreasonable.*—Under section 2599 of the Code of 1876, "the presentation may be made either to the executor or administrator, or by filing the claim, or a statement thereof, in the office of the judge of probate, in which letters were granted." And to file such claim in the probate office, it must, unless a written contract, be reduced to writing. The requisites of a valid presentation, and the object to be attained, being manifestly the same in each of these optional methods, it becomes not unreasonable to inquire whether they would be sufficient, if filed in the office of the judge of probate and entered on his docket, when given facts and circumstances are relied on as proof of personal representation.—*Ib.*
 7. *Bill to recover share of estate; necessary proofs; failure to make.*—T. W. was entitled to one-eighth of testator's estate, but died leaving three children, of whom complainant is sole survivor, the other two children having died at the ages respectively of 14 and 12; bill was filed by the survivor, seeking to recover the entire one-eighth, which fell to him and the other two children, the averment being that the other two died leaving no debts: *Held*, 1. Such averment is very material to complainant's right to recover the interests of the two deceased children. 2. That without proof sustaining said averment, the complainant can only recover the one-third interest of the one-eighth which would have fallen to his father.—*Morris et al. v. Morris*, 444.
 8. *Same*; *final settlement of executor and decree of Probate Court; failure of record to show.*—This court feels bound to hold, that the record in this case fails to show a valid final settlement and decree, so far as the present complainant and his brother and sister are concerned. As to their interests it names no person as plaintiff; hence the present proceeding must be treated as an application to recover the one-third of the one-eighth, as stated in 7th head-note, *supra*.—*Ib.*
 9. *Non-claim; statute of; what within influence of.*—Every claim, arising from a breach of contract, is within the operation of the statute of non-claim; though where the contract involves only a contingent liability, the claim may not accrue until the happening of the contingency, and does not fall within the statute until that time.—*McDowell, Adm'r, v. Jones, Adm'r*, 25.
 10. *Same.*—The liability of a surety on an administration bond, for a devastavit committed in the life-time of his principal, is strictly matter of contract, and is absolute, not contingent; accruing at the time of the devastavit, and not at the time of its subsequent judicial ascertainment.—*Ib.*
 11. *Same; what will not dispense with presentation.*—Knowledge on the part of the personal representative, of the existence of a claim, no matter how full and complete, is not equivalent to presentment, and does not dis-

ESTATES OF DECEDENTS—*Continued.*

- pense with the necessity of a presentment to avoid the bar of the statute of non-claim.—*Id.*
12. *Same; presentment; who can not make.*—A presentment of a claim within the statute of non-claim, can only be made by a party who has an interest in the claim, and a legal or equitable right to enforce it; a presentment by an administrator whose appointment is absolutely void, will not avoid the operation of the statute.—*Id.*
 13. *Same; what will not avoid the statute.*—A report of insolvency by an administrator founded on his knowledge of claims, or on a presentment by one who had authority to make it, will not avoid the bar of the statute; though on such report the estate is declared insolvent.—*Id.*

EVIDENCE. See DEPOSITION OF WITNESS—CRIMINAL LAW, 19-43.

1. *Evidence; admissibility and relevancy of.*—The testimony of a witness, who lived in the prisoner's family the Spring before a murder which he was accused of committing that Fall, as to where he kept his gun, and as to the hour at which certain of his children, who were witnesses, arose, is too remote to afford any reasonable inference as to where the gun was kept the night preceding and on the morning of the murder, or as to what time the children rose that morning; and is properly excluded.—*Fincher v. The State*, 215.
2. *Rules furnished agents by corporation.*—Where the corporation issued and furnished rules to its agents for their guidance, in conducting the scheme of awards and prizes authorized by its charter, the corporation may introduce them in evidence, when a forfeiture of the charter is sought for violations of the charter by its agents; it being for the jury to determine, in view of the evidence, whether it was the *bona fide* purpose of the corporation to be governed by such rules, or whether the rules were mere machinery to give the conduct of its business a show of legality, violations of which by agents were acquiesced in, or connived at by the officers in charge of its affairs.—*Tuscaloosa Scientific & Art Association v. The State*, *ex rel. Murphy*, 55.
3. *Evidence; relevancy of, not appearing of record; question properly excluded.* Where the court refused to allow a witness to state why another witness, who was near him, did not hear a conversation detailed by the former witness, and its relevancy is not shown, and it does not appear that the other witness did not hear such conversation, this court cannot say that the question was not properly excluded for want of relevancy.—*Cummins v. The State*, 387.
4. *Same; question asking opinion of witness.*—The question is also objectionable, because it asks for a mere opinion of the witness as to matters of which the jury are the judges.—*Id.*
5. *Deposition of witness; when inadmissible.*—Where the deposition of a witness, residing outside of the State, is taken, and he afterwards comes into the court at the time of the trial, and remains at the place where it is held, his unexplained absence at the time it is proposed to introduce his evidence, although not subpoenaed by either party, will not authorize the party taking the deposition to read it; his absence not being shown to have occurred without their procurement or consent.—*Mobile Life Ins. Co. v. Walker*, 290.
6. *Promissory note, giving of; what presumptive evidence of.*—The giving of a note is *prima facie* evidence of the settlement of all previous accounts between the parties; but no such presumption arises as to notes previously given.—*Tisdale, Ex'r, v. Maxwell*, 40.
7. *Same; presumption as to ownership of.*—Where a note, payable to two persons (not partners), is found by the executor of one of them, among the papers of his testator, after his death, and is produced on the trial, this is *prima facie* evidence that the note belonged to him in his representative capacity, and was unpaid.—*Id.* 41.
8. *Promise to pay obligation; burden of proof on assignee.*—Where A. makes a written obligation payable to B., and B. assigns the same as collateral to C., who relies upon the agreement of A. to pay to him such obliga-

EVIDENCE—Continued.

- tion, the onus of proving such agreement rests on C.—*Auerbach et al. v. Pritchett*, 451.
9. *Testimony of table-rates; when inadmissible.*—Where a policy shows on its face that it is of the class called "participating,"—especially where the assured so understood it at the time it was obtained—testimony of table rates of the company for premiums of other kinds of policies, is inadmissible to show that the rate of premium paid was that fixed for a different kind of policy, when it is not shown that such table-rates were brought to the notice of the assured.—*Piedmont & Arlington Life Ins. Co. v. Young*, 476.
 10. *Physician, opinion of, as to cause of death of assured; when admissible.*—A physician who attended the assured in his last illness, may give his opinion as to the disease with which he was afflicted, and as to the cause of his death.—*Mobile Life Ins. Co. v. Walker*, 290.
 11. *Examining physician of insurance company; what can not state.*—A life insurance company, when sued upon a policy issued by it, can not show by its physician, who, upon the report of the examination of the assured by another physician, had recommended the acceptance of his application, and upon whose recommendation the policy had been issued, whether he would have recommended the policy if he had known the assured was afflicted with lead poison, the assured not having answered, or been required to answer, upon that point in his application.—*Ib.*
 12. *Admission by defendant's solicitor; effect of.*—*Rogers et al. v. Torbat*, 523.
 13. *Oral evidence; when inadmissible to contradict subsequent contract.*—In the absence of fraud or mistake, a recital in a note given in lieu of a former contract, will be considered true, and incapable of contradiction by parol evidence; and in no event can such recital be altered by mere inferences from evidence of the original contract.—*Bryant, Adm'r, v. Stephens et al.* 636.
 14. *Parol evidence; when not admitted to show a valuable consideration of a conveyance.*—*Potter & Son v. Gracie*, 303.
 - 14a. *Oral testimony to vary written contract*, will not be received, except in a proceeding, with appropriate amendments, which has for its object the reformation of the writing.—*Terry v. Keaton*, 867.
 15. *Evidence to overturn contract; when insufficient.*—Where the plain language of certain notes shows that they are contracts for the payment of money for the purchase of certain lands, evidence that "it was not intended said notes should be a lien on the land," is insufficient to release the lien, or overturn the contract, which the law implies.—*Ib.*
 16. *Signature; what evidence inadmissible to prove.*—Where the issue is, whether a telegram is in the hand-writing of a particular person, his genuine signature to another instrument cannot be admitted, to enable the jury, by a comparison of the two, to determine by whom the telegram was written; but where suit is on a promise or request sent by telegram, and its execution is not denied by sworn plea, proof of the genuineness of the telegram is without the issue, and allowing comparison of hand-writing could not work injury, and is not ground for reversal.—*Bestor, adm'r, v. Roberts*, 331.
 17. *Intention of party; how arrived at, if material.*—When the intention of a party is material, it must be collected from the act done, in connection with the surrounding circumstances, and accompanying declarations. It is an inference drawn by the jury and not a fact to which a witness may testify.—*Sternau et al. v. Marx*, 608.
 18. *Judicial notice of charters and powers of private corporations.*—Judicial notice can not be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter, i. e. a special act of incorporation. If it is shown, however, to have been incorporated under the general laws, which authorize the formation and define the powers of corporations, these are public laws, of which notice must be taken, and the power must be referred to such general laws.—*Kelly et al. v. Trustees, &c.*, 489.

EVIDENCE—Continued.

19. *Money in circulation during the war ; judicial knowledge.*—The court takes judicial knowledge of the fact, that during the prevalence of the late civil war, neither gold, silver, nor United States money circulated in Alabama ; but that during said war, until the downfall of the Confederacy in 1865, Confederate States treasury notes, and their convertible equivalents, composed the only circulating medium.—*Morris et al. v. Morris*, 444.
20. *Duty of the judge in admitting or excluding evidence.*—It is the duty of the presiding judge, if satisfied that he has illegally admitted or excluded evidence, to correct the error during the trial by withdrawing from the jury evidence improperly admitted, or by admitting evidence improperly excluded, and such action of the court is not error if its final ruling is correct.—*Snow et al. v. The State*, 372.

ESTOPPEL.

1. *Promissory note; liability of maker to assignee; estoppel.*—If a promissory note, or other evidence of debt, is purchased on the faith of a promise by the maker to pay it, he will be compelled, at all events, to pay the assignee, and is estopped from asserting the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known at the time of such promise, or of a subsequent failure of consideration. And the same rule applies if the promisor had previously accepted an order to pay the debt, or any part of it, to another.—*Auerbach et al. v. Pritchett*, 451.
2. *Sale by, and purchase from executor ; estoppel.*—An executor and purchaser from him are estopped, so far as they are personally concerned, from controverting the legality of their own sale and purchase.—*Morris et al. v. Morris*, 444.
3. *When insurer estopped from denying kind of policy, &c., held by assured.*—Where an assured had obtained what he believed to be a "participating" policy, and verbally notified the agent, some time before the next premium fell due, that he wished a paid-up policy, and the agent stated, "it was all right, and he would attend to it," and several times afterwards being approached by the assured, said "it would be attended to," the company is estopped from saying that the assured did not hold a participating policy, and that the one held by assured had, by its terms, been forfeited for non-payment of premiums.—*Piedmont & Arlington Life Ins. Co. v. Young*, 476.
4. *What does not estop vendor from enforcing mortgage given by original vendee.* In such a case as the present, the mere fact that an attorney, while he held the deed to the original purchaser, as an escrow, wrote out a conveyance at the instance of such purchaser, to a third person, who paid the purchase-money, without actual notice that his immediate vendor had not paid, does not estop the vendor from enforcing the mortgage of the original vendee, if recorded in due time—such second purchaser never making inquiry of the attorney, and the attorney not being informed as to the terms of payment agreed on between the original and second purchaser.—*McRae et al. v. Newman*, 529.

EXECUTION.

1. *Execution ; upon what can not be levied.*—An execution can not be levied on shares of stock of an incorporated company, which have been pledged or mortgaged by the defendant in execution, as security for a debt, and transferred on the books of the company to the pledgee or mortgagee ; and a purchaser at sheriff's sale, under such levy, acquires no title to the shares.—*Nabring v. Bank of Mobile*, 204.
2. *Execution lien ; against whom and how lost by suspension of execution.*—The lien of an execution may be lost as against junior creditors, mortgagees, or vendees acquiring rights during the time the execution may be stayed by order of the plaintiff ; but as against the defendant in execution, his personal representative or heirs, the mere suspension of the execution will not affect the lien.—*Dryer v. Graham, adm'r*, 623.

EXECUTION—Continued.

3. *Judgment not a lien ; execution lien, how lost and renewed.*—Judgments do not operate as liens under our statutes ; it requires execution in the hands of the sheriff to create a lien on either real or personal property, which lien will be lost if an entire term of the court—from one session to another—is permitted to elapse. A new execution in the hand of the sheriff—not a reviver of the last lien—is required to create a new lien of such character.—*Gamble, ex'r, v. Fowler et al.*, 576.
4. *Same ; when mortgage paramount lien.*—A mortgage executed after an execution lien had been created and allowed to lapse, and before such execution lien was renewed, is a paramount lien to such renewed execution lien.—*Ib.*
5. *Execution ; of what is notice to sheriff.*—An execution in the sheriff's hands is notice to him of the time when the judgment was rendered, but not of the time when the debt, on which it is founded, was contracted.—*Wilson v. Brown, et al.*, 62.
6. *Venditioni exponas ; issuance and nature of ; when proper writ ; sale under.* Although the statute declares, that a *fieri facias* issued and received by the sheriff during the life of the defendant, may be levied after his death ; or if a term has not intervened, that an *alias* may issue and be levied, and does not expressly authorize the issue of a *venditioni exponas* ; yet the *venditioni exponas* is in the nature of an *alias* execution as to property upon which a levy has been already made, is within the spirit of the statute, and a proper writ to complete the execution already begun ; and if issued in continuation of the lien acquired in the life of the defendant, a sale under it will pass the decedent's title.—*Dryer v. Graham, adm'r*, 623.
7. *Execution of process ; authority of attorney to superintend.* (See *Process*.)
8. *Sheriff ; when onus lies on, to show diligence.*—Where a sheriff, having process in his hands for that purpose, fails to levy on property in possession of the defendant, or having levied, discharges the levy without selling, and without making the money on the execution, the *onus* is on him to show a legal excuse for his conduct.—*Wilson v. Brown et al.* 62.
9. *Sheriff ; when not liable for releasing property not exempt.*—A sheriff can not be held liable for discharging the levy of execution on property which was claimed as exempt, on the ground that plaintiff's debt was contracted before the enactment of the exemption law, unless it be shown that the sheriff had notice, actual or implied, of that fact.—*Ib.*

EXECUTORS AND ADMINISTRATORS.

1. *Grant of letters ; when void.*—A grant of letters of administration *de bonis non* is a nullity, when the order removing the administrator in chief is void ; and it confers on the person so appointed no authority to make presentment of claims due the estate.—*McDowell v. Jones*, 25.
2. *Executor, de son tort ; when protected.*—An executor, *de son tort*, can not, by his wrongful act, acquire a benefit, but is protected in all acts, not for his own benefit, which the rightful representative may do.—*Brown, adm'r, v. Walter et al.*, 310.
3. *Same.*—Where one has received and used assets of an intestate, under circumstances constituting him an executor *de son tort*, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees as they must have been applied in due course of administration.—*Ib.*
4. *Widow ; what will not constitute her executor de son tort.*—A widow, retaining and using property exempt from administration, for the support of herself and minor children of her husband, who died intestate without debts, is not guilty of any conversion which can render her an executor *de son tort* ; nor can the husband's administrator call her to account for the children's share upon their reaching majority—this right belongs to the children.—*Ib.* 311.
5. *Executor may retain money due him ; when claim too small for chancery jurisdiction.*—Where the entire debt due an estate from the executor

EXECUTORS AND ADMINISTRATORS—*Continued.*

- amounted to \$2,850, and his legacy and commissions were \$2,800, he was authorized to retain the amount due him out of the \$2,850, leaving him to account for the small residuum of \$50; and where the complainant is entitled to only 1-24 ($\frac{1}{24}$ of $\frac{1}{4}$) of such residuum, his claim is too small for chancery jurisdiction.—*Morris et al v. Morris*, 444.
6. *Faithful administration by executor, of Confederate funds.*—Where an executor had in hand, in 1864, nearly one thousand dollars Confederate currency, in trust for complainant, who was a minor residing in Texas, where the executor could not reach him, and the will directed the executor to retain it, and there is no averment or proof that he could have invested it with profit, and it became valueless in his hands at the close of the war and before he could obtain access to complainant, and the identical money was deposited in the Probate Court by the executor, where it now remains, and he dealt the same way with his own funds—such facts present a strong case of faithful administration.—*Ib.*
 7. *Sale by personal representative for Confederate money; when no devastavit committed.*—Where a personal representative, in good faith, received Confederate money in the course of administration, he did not thereby commit a *devastavit*, or incur a greater liability than to account for the honest and faithful administration of the same.—*Ib.*
 8. *Administrator commingling funds of estate with his own; when accountable as for conversion.*—Where an administrator commingles funds of an estate with his own, so that the separate identity of the trust fund cannot be traced—as by depositing and keeping such money in bank, in his own name, with his own funds—he is accountable to the beneficiaries, at their option, as for a conversion; and this settled rule cannot be disturbed, however oppressive its operation may be in the particular case, or however pure the intention with which such deposit was made.—*Henderson's Adm'r v. Henderson's Heirs*, 582.
 9. *Sale by and purchase from executor; estoppel.*—An executor and purchaser from him are estopped, so far as they are personally concerned, from controverting the legality of their own sale and purchase.—*Morris et al v. Morris*, 444.
 10. *Same; what not necessary inquiry.*—Where a bill does not seek to set aside sales made by an executor, but, on the contrary, ratifies and confirms them, the court need not inquire whether such sales were or could have been made under powers contained in the will, or under orders of the Probate Court.—*Ib.*
 11. *Bill to recover legacy from executor; proper parties defendant.*—Where a bill seeks primarily and mainly to recover of an executor and his sureties, a legacy, the executor, his sureties, and the other legatees under the will, are necessary parties defendant.—*Ib.*
 12. *Administrator; how holds estate after debts are paid.*—After the debts are paid the administrator has charge of the estate for the benefit of the heirs, and a court of probate can not investigate and settle transactions between them which do not strictly pertain to the office of administrator.—*Bailey, adm'r v. Mordin*, 104.
 13. *Same; what credits entitled to.*—Where the administrator, at the request of the widow and heirs, who were minors over fourteen years of age, consents to perform his office so as to supply the place of a guardian for them, he is entitled to credit for reasonable expenditures for their benefit; and if in so doing he has not left in his hands a residue sufficient to meet the expenses of the administration, the estate of which he was administrator will be subjected to their payment by a court of equity.—*Ib.*
 14. *Sale by administrator, in violation of order of court.*—Where an administrator violates the order of the Probate Court in making a sale of decedent's lands, and sells on a credit instead of for cash, the sale is in excess of his authority, and depends for its validity on the subsequent ratification of the heirs or devisees, or, in a proper case, its confirmation by the court of chancery.—*McCully v. Chapman*, 325.
 15. *Want of authority of administrator to make sale; who can not deny.*—One

EXECUTORS AND ADMINISTRATORS—*Continued.*

- who enters and remains in possession of land under a sale by the administrator, can not be heard to deny his authority to make it, and thus defeat payment of the purchase-money; but may, if the sale was in excess of his authority, on proper proceedings, compel creditors and heirs to elect its ratification and confirmation or rescission.—*McCully v. Chapman, adm'r*, 325.
16. *Private act authorizing administratrix to sell land; validity of.*—The validity of a special act authorizing a widow in her representative capacity, as administratrix of her deceased husband, to make private sale of the lands of her said husband and intestate, for the purpose of division among the heirs, is supported by former decisions of this court, and on account of the frequency of such enactments under former constitutions, and the number of titles involved, it is too late to reopen the question as to the legislative power to enact them.—*Watson v. Dates*, 647.
 17. *Administrator; when will be enjoined at instance of heirs from selling lands of intestate to pay expenses of administration.*—A court of equity, at the instance of adult heirs, who paid up all the debts of their ancestor except a very trifling amount due a single creditor, and divided his lands among themselves, will enjoin a sale of the lands to pay expenses of administration and costs of litigation carried on by an administrator, who, without being so requested by the creditor or any heir, sued out letters and engaged in litigation, for the avowed and selfish purpose of running out of the country a person in possession, and buying the lands himself.—*Owens, adm'r, v. Childs et al.* 113.
 18. *Administrator de bonis non may move to vacate sale of intestate's land.*—There is such privity between an administrator *de bonis non* and his intestate, as will authorize the former to move a vacation of a sale of the intestate's lands upon irregular process.—*Dryer v. Graham, adm'r*, 623.
 19. *Personal representative; action by, for assault and battery on intestate.*—The personal representative cannot maintain an action to recover damages for an assault and battery committed on intestate in his life-time.—*Hadley et al. v. Bryer's Adm'r* 185. (See *Action*, 1.)
 20. *Action by personal representative for money had and received by intestate.*—*Smith v. Hellows, adm'r*, 467. (See *Action*, 5.)
 21. *When legal title to money obligation vests in personal representative.*—*Auerbach et al. v. Pritchett*, 451. (See *Bills of Exchange and Promissory Notes*, 4.)
 22. *General administrator of Mobile.* (See *Mobile*).

EXEMPTIONS.

1. *Exemption law; what unconstitutional.*—A State law which increases exemptions, so far as it applies to debts previously contracted, impairs the obligation of contracts and is void.—*Wilson v. Brown et al.* 62.
2. *Exemption; claim of by widow non-resident; subordinate to what.*—An administratrix of her deceased husband, who resided with him in Florida at the time of his death, can claim no exemption under the statutes of Alabama; and if she asserted such claim under the statutes of Florida, she should set it up in the bill and establish it by proof. But if this were done, it could not prevail over a valid transfer by deceased in his life-time.—*Auerbach v. Pritchett*, 451.
3. *Homestead exemption under § 2880 of Revised Code; what necessary to entitle to.*—To constitute a valid claim of exemption under section 2880 of the Revised Code, it must be shown that defendant had a family and that the lands claimed embraced his homestead.—*Wilson v. Brown et al.* 62.
4. *Mortgage of homestead under exemption act; separate examination of wife.*—A mortgage of the homestead under the act "to regulate property exempted from sale and the payment of debts," (Acts 1872-3, p. 64), required the voluntary signature and assent of the wife, which could be shown only by her examination, touching the same, separate and apart from her husband.—*Balkum v. Wood*, 642.

EXEMPTIONS—Continued.

5. *Same; when mortgage void; subsequent acknowledgment no avail.*—A mortgage of the homestead without the formalities required by said act is absolutely null and void; and, it not being regarded an instrument imperfectly executed, which may be afterwards perfected, a subsequent acknowledgment will not validate it and can have no retroactive effect.—*Ib.*
6. *Effect of levy of attachment on exempt property.*—The levy of an attachment on personalty which is exempt, can not affect the defendant's exemption, but the levy, although it be released on that account, will bring the defendant before the court.—*Hadley et al. v. Bryers*, 139.

FEES AND COSTS. See Costs.

1. *Solicitor's fee for conviction for selling lottery ticket; what law governs.*—On indictment under § 4445 of the Code, in the form prescribed "for setting up or being concerned in a lottery," &c., a conviction may be had for the illegal sale of a lottery ticket on behalf of the manager, and the solicitor's fee may be taxed under that section; but where departing from the Code form, the indictment, or count, remaining after a *nolle pros.*, pursues the language of a subsequent statute (now § 4446 of Code) making it a specific offense "to act for, or represent any other person in disposing of" a lottery ticket, it is an election to proceed under the latter statute, and on conviction, the solicitor's fee must be taxed under it, though both offenses are punished alike.—*Ex parte Tompkins*, 71.
2. *Fees of attorneys; when recoverable in action on detinue bond.*—*Mills v. Long et al.* 458.
3. *Same; when recoverable in action on injunction bond.*—*Robertson v. Robertson et al.* 68.
4. *Fees and costs distinguished, and defined.*—Costs and fees are essentially different. The former are an allowance to a party for the expenses incurred in prosecuting or defending a suit—an incident to the judgment; while the latter are compensation to public officers for services rendered individuals, in the progress of the cause, or (in another aspect), not in the course of litigation.—*Tilman v. Wood*, 578.
5. *Compensation for recording conveyance; a fee, recoverable how.*—The compensation of a probate judge for recording a conveyance, is a fee and not costs; and may be recovered from the party for whom service is rendered in an ordinary action for work and labor done and performed.—*Ib.*
6. *Same; statutes strictly construed; fees only allowed as prescribed.*—Whether statutes as to fees be as strictly construed as those imposing costs, is not a practical question. But whenever a judge of probate, or any other public officer, demands from an individual a fee for official service, he must point to some clear and definite provision of the statute authorizing the same.—*Ib.*
7. *Compensation to probate judge for registering conveyances; what allowed by statute.*—Registering a conveyance in the probate office is an entirety—comprehending the body of the conveyance, the probate, acknowledgment, if any, the endorsement of the day received for record, and the certificate of registration—for which service the statute fixes the compensation at twenty cents per hundred words. There is no statute authorizing a charge of a separate and additional fee for the certificate of registration. The above compensation is for the whole act.—*Ib.*
8. *Motion to dismiss for want of security for costs; waiver.*—If the defendant appears and pleads, or otherwise enters into defense, without moving to dismiss for want of security for costs, he thereby waives the objection, and admits himself rightly in court.—*Heflin v. Rock Mills Manuf'g Co.* 613
9. *Same; when such motion properly overruled.*—Where the defendant appeared before the circuit judge, in a suit by petition for rehearing, and moved to dismiss the petition and filed demurrers—pertaining solely to the sufficiency of the petition—and his motions and demurrers being overruled, applied to the Supreme Court for *mandamus* to compel the

FEES AND COSTS—*Continued.*

circuit judge to dismiss petition on the grounds contained in said motions and demurrers, and, after the Supreme Court denied the *mandamus*, he made a motion in the Circuit Court to dismiss for want of security for costs—*held*, that such last motion being made at such time, was properly overruled. (Case of *Davis Avenue Railroad Co. v. Mallon*, 57 Ala. 168, held to be unlike the present case in principle.)—*Ib.*

FRAUD. See FRAUDULENT CONVEYANCES.

1. *Fraud; allegations of; demurrer.*—Fraud is a conclusion of law from facts stated and proved. When it is pleaded at law, or in equity, the facts out of which it is supposed to arise must be stated; a mere general averment is insufficient upon which to pronounce judgment. A demurrer to such pleading is not a confession of the fraud; for a demurrer confesses only the matters of fact which are well pleaded, and not conclusions or inferences of law or fact.—*Flewellen et al. v. Crane*, 627.
2. *Misrepresentation; what will avoid sale.*—A misrepresentation by the seller, which will avoid the sale, or defeat an action for the recovery of the purchase-money, must be of a material fact, operating as an inducement to the purchase; and the purchaser having a clear right to rely on it, must be deceived thereby.—*Fore, adm'r, v. McKenzie*, 115.
3. *Sale of lands; what principle not applicable to.*—The principle declared in *Atwood v. Wright* (29 Ala. 346), as to the fraud or misrepresentation of the administrator making a sale, is confined to sales of personality.—*Ib.*

FRAUDULENT CONVEYANCES. See ASSIGNMENT, 1-7.

1. *Fraudulent conveyance; right to proceed at law; when will not interfere with right to proceed in equity.*—Because a judgment creditor may, at law, proceed to sell under execution, lands which his debtor has fraudulently aliened, and the purchaser may, in ejectment, recover them of the fraudulent donee, the existence of such rights does not interfere with the right to resort to equity for the vacation of a fraudulent conveyance as an obstacle in the way of the full enforcement of the judgment, and a cloud on the title to the property.—*Flewellen et al. v. Crane*, 627.
2. *Preference for particular creditor by insolvent debtor.*—The bill presents a case of preference for a particular creditor by an insolvent debtor, the effect of which is to disappoint all other creditors. It was competent for the debtor to confer, and for the creditor to accept such preference.—*Ib.*
3. *Sale; what necessary to avoid as fraudulent.*—To avoid a sale, when made on an adequate new consideration, on the ground that it was made with intent to hinder, delay and defraud creditors, the attacking creditors must show that the vendor made the sale with that intent, and that the purchaser participated in it, or had knowledge of some fact calculated to put him on inquiry, and thus charge him with notice.—*Florence Sewing Machine Co. v. Zeigler*, 221.
4. *Bona fide purchaser; what necessary to constitute.*—To constitute the defense of *bona fide* purchaser without notice, the purchaser must have paid the purchase-money in full, before notice of the fraud of the vendor; and any payment made by him after notice is in his own wrong; but, as to partial payments, made before notice, he acquires an equity *pro tanto*. Whether the rule applies to sales of personal property, is not decided.—*Ib.*
5. *Conveyance; what void as to creditors.*—A conveyance to a mistress, or to her illegitimate child, though intended merely as a provision for maintenance, and not looking to future cohabitation, is void as against existing creditors.—*Potter & Son v. Gracie*, 303.
6. *Conveyance to mistress; what necessary to support.*—To support a conveyance to a mistress, on the ground of valuable consideration, there must be clear and convincing proof of such consideration, to overcome the unfavorable inferences which the court would draw from the illegal relation existing between the parties.—*Ib.*

FRAUDULENT CONVEYANCES—Continued.

7. *Consideration; proof of, different from that stated in conveyance.*—If the conveyance itself recites that it is made on divers good considerations, and for kindness felt by the grantor towards the grantees, (the mistress and her child), parol evidence can not be received to show valuable consideration.—*Ib.*
8. *Conveyance in fraud of creditors; for what purpose may be allowed force.*—When a voluntary conveyance, not tainted with actual fraud, is set aside in equity, at the instance of existing creditors, it will, nevertheless, be allowed to stand as a security to reimburse the grantee, for money paid by him in removing a valid incumbrance on the property.—*Ib.*
9. *Same; for what grantee must account.*—If the grantee has been put in possession of the property under the conveyance, the value of the use and occupation will be charged against him, and set off against moneys paid by him for taxes and insurance, and in removing prior incumbrances.—*Ib.*

GARNISHMENT.

1. *Garnishment; what debt will reach.*—The maker of a negotiable promissory note who, before its maturity, is garnished by a creditor of the payee, and after it matures takes the note up, giving the payee another negotiable note in extension of the debt, can not thereby affect the rights of the garnishing creditor; and the first note being owned and held by the payee at maturity, judgment in favor of the garnishing creditor is properly rendered against the maker, although the renewal note has not matured and the maker does not know who owns it.—*Leslie v. Merrill, Fitch & Allen, 322.*

GUARANTY. See RECOMMENDATION.

GUARDIAN AND WARD.

1. *Settlement of guardian; what valid, though ward not represented by guardian ad litem.*—A decree rendered on final settlement of a resigned guardian, is not erroneous or invalid, because it shows that the minor was represented on the settlement by the succeeding guardian, instead of a guardian ad litem; and such decree, in the absence of fraud, or other equitable ground of relief against it, is conclusive on the minor.—*Jones, pro ami, v. Fellows et al. 343.*
2. *Guardian ad litem; written acceptance of, not necessary.*—In proceedings in the Probate Court, written acceptance of appointment as guardian ad litem is not necessary. It is enough if the record shows that he did accept and serve.—*Morris et al. v. Morris, 444.*
3. General guardian of Mobile county. (See *Mobile*).

HANDWRITING. See EVIDENCE, 16.

HARD LABOR FOR THE COUNTY. See CRIMINAL LAW, 133.

HOMESTEAD. See EXEMPTIONS, 3-5.

HOMICIDE. See CRIMINAL LAW, 91-105.

1. *Act to prevent homicides, omitted from Code; subsequent act to supply omission; remedy against corporations for acts causing death.*—The act approved February 21, 1860, entitled, "an act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted; and the act of the same title, approved February 21st, 1872, having been passed to remedy the omission; section 1941 (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death, which said sections 1938, 1939, gave against individuals, now gives the same remedy as by the amending act of 1872.—*Savannah & Memphis R. R. Co. v. Shearer, 672.*

HOMICIDE—Continued.

2. *Contributory negligence; defensive matter; burden of proof.*—In an action to recover damages for a wrongful act causing death, contributory negligence on the part of the deceased is defensive matter, and the burden of proving it rests on the defendant, unless the plaintiff's own testimony inculcates the deceased.—*Ib.*
3. *Punitive damages under statute; to what extent recoverable.*—The damages allowed by the statute which gives an action for a wrongful act causing death, are punitive, and are not confined to the pecuniary loss sustained by the family of the deceased by reason of his death.—*Ib.*
4. *Attachment at suit of personal representative; when not maintainable under the above act.*—*Hudley et al. v. Bryer's Admr.*, 185. (See *Action*, 1).

HUSBAND AND WIFE.

1. *Wife as a witness in criminal case.* (See *Criminal Law*, 135, 136.)
2. *Wife's separate estate.*—The object of sections 2705 and 2706 of the Code of 1876 was to abrogate the common law which conferred upon a husband the ownership of his wife's personal estate, when not secured to her separate use, and of her real estate during their joint lives: and to preserve such property as the separate estate of the wife, with her husband as trustee without accountability for rents and profits, but with the intent that the family should, if necessary, be thereby supported.—*Baker v. Flournoy and Wife*, 650.
3. *Same; liability for articles of comfort, &c., under § 2711.*—The statutes, §§ 2705, 2706, were not intended to operate on or make the husband manager of any other property of the wife than that of which he would have become the owner by virtue of the marriage, but for such enactment. And it is only such property that, by section 2711 of the Code, is made liable for "articles of comfort and support of the household," &c.—*Ib.*
4. *Same; estate in remainder, &c., marital rights do not attach.*—At common law, the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate. And the same is not subject to the debts of the husband for necessities, comforts, &c. (Strong, J., dissenting.)—*Ib.*
5. *Same; when may be subjected to costs of suit.*—The statutory separate estate of a married woman, brought within the jurisdiction of the Chancery Court, by her institution of a suit with respect to it, may be subjected, on execution against it, for the costs of suit, after fruitless execution therefor against the next friend; and although she may appeal to the Supreme Court, without giving security for costs, such part of her statutory estate will be liable for the satisfaction of the costs here, if the appeal be decided adversely to her.—*Huynie pro ami v. Lundie et al.*, 100.
6. *Same.*—The execution in such a case must be satisfied out of the statutory estate within the jurisdiction of the court, and can not run against the married woman personally, or her goods, chattels, or estate generally.—*Ib.*
7. *Same; misjoinder of parties complainant; when feme covert cannot claim personal relief.*—To a bill seeking relief from a mortgage on account of usury, parties complainant should not be joined unless they are entitled to common relief. And though each and all may be entitled to make the defense of usury, yet where the rights of one of the complainants is that of a *feme covert* claiming that the property is her statutory estate, and not subject to the mortgage made by her for the security of another's debt, such right is personal to her, and she cannot claim this personal relief under a bill filed by her conjointly with her husband and another male complainant.—*Rogers et al. v. Torbut, et al.*, 523.
8. *Conveyance by wife; what will not avoid.*—Where husband and wife, on valuable consideration, convey her lands to another by deed duly executed and acknowledged, she can not impeach it, as against the grantee,

HUSBAND AND WIFE—*Continued.*

- because of the fraud or undue influence of the husband, in which the grantee did not participate, which he has not induced, to which he is not a privy, and of which he was not informed.—*Moses et al. v. Dads*, 211.
9. *Same; execution of; how brought to notice of court pending wife's suit for property; effect of.*—Where, pending the wife's suit to have the lands restored to her, she and her husband, on valuable consideration, execute a conveyance of them to the defendant, by deed duly executed and acknowledged, such defense is properly brought to the notice of the court by cross bill; and the deed is valid, and a bar to the further maintenance of the wife's suit.—*Ib.*
 10. *Distribution; part husband takes in wife's personalty; parties to bill for distribution.*—Where husband and wife sell lands of her statutory estate, taking notes for the purchase-money, her estate is thereby converted into personalty, and her husband, on her death intestate, takes one-half absolutely; and where the wife's distributees seek to enforce the vendor's lien and a decree for the amount of the notes, they are not entitled to relief—though a case proper for distribution direct, without administration on the wife's estate, be shown—if the bill showing the husband survived the wife, fails to make him a party; and the objection may be raised for the first time in the appellate court.—*Marshall et al. v. Gayle, et al.* 284.
 11. *Same; when distributees can not maintain bill for distribution.*—Where, in such a case, administration was had on the wife's estate, which is declared insolvent, and the administrator settles and resigns, nothing further being done in the administration, the distributees directly can not maintain such a suit; and the fact they are too poor to cause further administration or take out letters for that purpose, can not dispense with the necessity for administration, and having those interested in the estate properly before the court.—*Ib.*
 12. *Lien notes payable to wife of vendor; suit by wife's administrator.*—Where husband and wife joined in a conveyance of husband's lands for the purchase of which promissory notes were given by the vendee, payable to the wife, who died intestate, before such notes were paid, her administrator may file a bill to enforce the lien created by said notes. The husband had the right to have the notes made payable to his wife, and thus vest their ownership in her, which may be enforced against the vendee, though void against his creditors at the time, if they complain.—*Terry v. Keaton et al.* 667.
 13. *Same; gift by husband to wife.*—A gift by a husband to a wife, such as making payable to her the purchase-money notes for the sale of his land, vests in her only such title as he may resume at any time during his life. (This head note refers to an authority quoted in the opinion, and does not express the decision in this case, being upon a point not necessary to a decision.)—*Ib.*
 14. *Mortgage of homestead; examination and acknowledgment of wife.*—*Balkum v. Wood*, 642.

INDICTMENT. See CRIMINAL LAW, 45–53.

INFORMATION.

1. *Proceedings to remove attorney; information.*—The statutory proceeding for removing an attorney, under section 882 R. C., is in the nature of a criminal proceeding, and an information under such section must disclose with certainty the facts of misconduct, and that the defendant is amenable to the proceeding.—*Thomas v. The State, ex rel. Stegney*, 365.
2. *Averment; uncertainty of; defect raised first time in Supreme Court*—An averment in the information that the defendant "hath been, and now is, an attorney practicing in the courts of the State of Alabama, in the county of Dallas," may apply either to a licensed attorney, or one without license practicing temporarily by comity, and is for that reason uncertain in statement; and such want of certainty, being a defect of

INFORMATION—*Continued.*

substance fatal to a judgment rendered thereon, may be raised for the first time in the appellate court.—*Ib.*

INJUNCTION.

1. *Administrator; when will be enjoined at instance of heirs from selling lands of intestate to pay expenses of administration.*—A court of equity, at the instance of adult heirs, who paid up all the debts of their ancestor except a very trifling amount due a single creditor and divided his lands among themselves, will enjoin a sale of the lands to pay expenses of administration and costs of litigation carried on by an administrator, who, without being so requested by the creditor or any heir, sued out letters and engaged in litigation, for the avowed and selfish purpose of running out of the country a person in possession, and buying the lands himself.—*Owens, adm'r, v. Childs et al.* 113.
2. *Injunction bond; what damages not recoverable on.*—Attorney's fees in procuring the dissolution of an injunction, and in resisting a motion to re-instate, are recoverable as part of the damages on an injunction bond, conditioned according to § 3430 of the Revised Code, but the fees paid for the after defense of the cause are not; and the rule is not different, because the bill sought the cancellation of a mortgage, and a perpetual injunction against a sale of property under it.—*Robertson v. Robertson et al.* 68.

INSURANCE. See LIFE INSURANCE.

INTERNAL IMPROVEMENT LAW.

1. *Question for chancery jurisdiction.*—Whether or not the statutory lien given in favor of the State to secure bonds endorsed under the internal improvement aid law, can operate in favor of a holder of such bonds, and entitle him to be subrogated to such lien, is a question that can be decided in no other than a chancery court, and if the chancellor commits error in a decree thereon, it is not to be revised or corrected by a writ of prohibition.—*Ex parte Brown*, 536.
2. *State endorsement under Acts 1869-70, creating paramount lien; when railroad company may create subordinate lien.*—The internal improvement law, (Acts of 1869-70, p. 70,) while providing that the State shall have a first and permanent lien for its protection, when it has endorsed bonds under that act, does not forbid the railroad corporations from creating other liens on the property subordinate to such lien of the State; especially a lien to secure the bonds endorsed, &c.—*Kelly et al. v. Trustees Ala. & Cin. R. R. Co.*, 489.

JUDGMENTS AND DECREES.

1. *Judgment not a lien; execution lien, how lost and renewed.*—Judgments do not operate as liens under our statutes; it requires execution in the hands of the sheriff to create a lien on either real or personal property, which lien will be lost if an entire term of the court—from one session to another—is permitted to elapse. A new execution in the hand of the sheriff—not a reviver of the last lien—is required to create a new lien of such character.—*Gamble, Ec'r, v. Fowler et al.* 576.
2. *Sale of lands by register; when not set aside as being premature, or because decree fails to designate place of sale.*—In a suit in chancery to subject lands to the payment of debts, a consent decree was rendered in June, 1875, ascertaining the amount of indebtedness entitled to a lien on the land, and directing that the register proceed "upon or after the 15th day of November next, to sell the lands for cash at public outcry to the highest bidder, after first giving notice of the time and place, and terms of sale, by publication" in a designated newspaper for three weeks, &c. The decree also contained this further stipulation: "If, before the 15th day of November, 1875, the defendants shall pay the costs of this suit, and \$200, to be applied *pro rata* on debts due complainants, then the

JUDGMENTS AND DECREES—*Continued.*

sale of said lands shall be stayed until the 15th day of November, 1876, when the sale shall take place upon the same terms and conditions as above provided, unless the defendants shall before that time pay" another given sum, &c. The decree further directed, if the register should fail to advertise and sell the lands "on any of the days herein mentioned on which he is directed to sell, he shall do so as early thereafter as convenient, and if the defendants fail to pay any of the amounts herein specified, there shall be no further delay," &c. The register having first made publication as directed in the order, &c., exposed the lands for sale at public outcry at the court-house door of the county in which the lands were situate, and the court was held, on the 15th day of November, 1875, and executed a conveyance to the purchaser, who was the highest bidder. Upon the coming in of his report showing these facts, and certifying the failure of the defendants to comply with the terms of the order of sale, the defendants excepted to the report, &c., because the sale was prematurely made, and because no place of sale was designated in the decree, and the chancellor refused to confirm the report and set aside the sale, on the ground that it was prematurely made. *Held:*

1. The effect of the stipulation for a stay of sale was to confer on defendants the right to a further stay to a given day, beyond that fixed in the order, upon making payment as therein provided "before the 15th day of November, 1875," and not having made payment before that time, a sale on that day (proper advertisement first having been made) was authorized by the decree; and although defendants had the legal right, independent of the stipulations of the decree, to stop the sale at any time before it was actually made, upon paying the debt and costs, this right, in the absence of such payment or tender, could not affect the validity of the sale made on the day named in the decree.
2. A sale of lands, made after due advertisement and in the usual manner of judicial sales, at the court-house door of the county where the lands lie, will not be set aside, merely because the decree is silent as to the place where the sale is to be made.—*Hooper v. Young et al.* 585.
3. *Judgment imposing hard labor for costs; what should be specified.*—Judgments imposing hard labor for the county for payment of costs, should specify the precise amount, and the number of days the defendant is to serve for their payment, and the sum allowed for each day's service; but judgments imposing such hard labor at a certain rate until the costs are paid, without specifying the number of days or amount of costs, have been too often sanctioned by this court for them to now be held erroneous.—*Walker v. The State*, 393.
4. *Decree rendered in vacation; repeal and amendments of certain statutes in reference thereto; when an act repealed or revived.*—1. The provision of the Revised Code (§ 3470), which authorized the chancellor to render decrees in vacation, within six months, was repealed by the amendatory act of December 8th, 1873, which authorizes decrees in vacation, within ninety days, by consent. This latter act was repealed by "an act to repeal an act to amend § 3470 of the Revised Code of Alabama," approved Feb. 4th, 1876, which provided in a separate section that chancellors might, "in difficult cases, render decrees in vacation, within six months after the submission of causes." 2. Under the constitution of 1868 (Art. 4, § 2), section 3470 of the Revised Code was *ipso facto* repealed by the amendatory act of 1873, although it contained no express words of repeal. 3. The repeal of the amendatory act, by the act of Feb. 4th, 1876, did not revive or restore that section, the constitution of 1875 (Art. 10, § 2), forbidding any law to be 'revived, amended,' or the provisions thereof extended or conferred by reference to its title only. 4. The title of the act of Feb. 4th, 1876, "To repeal an act to amend § 3470 of the Revised Code of Alabama," does not express any intention to revive that section, and is so restricted in its title that it does not authorize the incorporation, in the one subject to which it relates, of a provision reviving that section, or substantially re-enacting it in terms;

JUDGMENTS AND DECREES—*Continued.*

- and hence its second section is unconstitutional. 5. From the passage of the act of Feb. 4th, 1876, up to the time when the Code of 1876 went into effect, there was no statute authorizing the chancellor to render decrees in vacation without the consent of the parties. 6. What effect the incorporation of the second section of the act of Feb. 4th, 1876, into the Code of 1876, will have upon cases arising since said Code went into effect, is not decided.—*Rogers et al. v. Torbut et al.* 523.
5. *Prayer for general relief; what relief will not be granted under.*—Where the original bill sought to set aside a sale of personal property and choses in action, on the ground that it was fraudulent as against creditors, and also asked the appointment of a receiver to take charge of the property and collect the debts, the business acquired by the purchaser being broken up by the appointment of a receiver, and the complainant failing to establish any participation on the part of the purchaser in the fraud of the vendor, the court will not, under the general prayer for relief, require the purchaser to pay over to the complainant the unpaid portion of the purchase-money.—*Florence Sewing Machine Co. v. Zeigler*, 222.
6. *Execution of decree; may be temporarily restrained.*—A chancellor may, upon application to him in a particular case, restrain, temporarily, the execution of his decree, until the determination of some matter to be affected by it shall be first obtained, when justice between the parties would thus be promoted. The fact, as in this case, that the property was in the hands of the court through its receiver, would be a good reason for fixing more lenient terms upon which such stay is granted. *Ex parte Brown*, 537.
7. *Reversal though no objection made below.*—This court has repeatedly held that a decree founded on a bill which does not aver facts, authorizing the court to grant relief, will be reversed on error, though no objection may have been interposed in the primary court.—*Flewellen et al v. Crane*, 627.

JUSTICE OF THE PEACE. See NOTARY PUBLIC.

1. Several suits before justice; when consolidated in city court.—*Berry et al. v. Ferguson*, 314. (See ACTION, 4.)

LANDLORD AND TENANT.

1. *Statutory lien for rent; arises from what relation.*—The lien the statute creates for the payment of rent arises only from the relation of landlord and tenant, and not from that of vendor and vendee.—*Collins v. Whigham*, 438.
2. *Same; relation created by election, refers back to contract.*—Whenever the election is manifested by a performance or non-performance of the stipulations, all the rights and incidents of the relation, as between the parties, and all persons who have, with notice, acquired rights which may be impaired, will attach from the time of making the contract.—*Ib.*
3. *Rent; when passes with reversion.*—Rent is an incident to the reversion, and whoever is entitled to the reversion when the rent falls due, is also entitled to the rent, unless it was reserved from the grant, or has been previously severed; and this, whether the assignment of the reversion is by act of the lessor, or by operation of law.—*Tubb v. Fort*, 277.
4. *Same.*—The purchaser, under a decree in chancery of the lessor's lands, is entitled to the rent afterwards falling due, as against the assignee of the tenant's obligation to pay, whose interest was acquired pending suit, although the claim of the assignee would prevail against the lessor; and attornment on the part of the tenant is not necessary to perfect the right of the purchaser.—*Ib.*
5. *Same; when bill in equity will not lie for recovery of.*—Where the right to recover rent is legal, and there is an adequate legal remedy, a court of chancery should not, in the absence of some equitable ground, take jurisdiction to decree its recovery.—*Ib.*

LANDLORD AND TENANT—Continued.

6. *Interest of landlord; attachment; what not subject to.*—The interest of the landlord in the crops grown on the rented premises, by reason of his lien for rent and advances, is not such a title or interest as can be levied upon under execution or attachment.—*Starnes v. Allen West & Co.* 317.
7. *What subordinate to landlord's lien for rent.*—*Collins v. Whigham*, 438.
8. *Ejectment; landlord and tenant; defendants to action, who affected by judgment.*—If the tenant in possession is not made a defendant, he can not be ejected under a writ of *habere facias*, issued on the judgment; and if the tenant only is sued, the judgment against him is not evidence against his landlord, unless the latter was joined with the tenant in defense; but all persons who enter into possession pending the suit, are bound by the judgment; and if the landlord, not being made a defendant, receives possession, pending the suit, from the tenant, who alone is sued out, he (the landlord) may be turned out under the writ of possession.—*Smith et al. v. Gayle*, 600.

LARCENY. See CRIMINAL LAW, 65-86.

1. Charge of attempt to commit larceny; when actionable.—(See *Slander*.)

LEGACY AND DEVISE.

1. *Heir, title of; when divested.*—The title of the heir or devisee to lands devised or descended, and sold under order of the probate court for cash, is not divested until the purchase-money has been paid, the sale reported to and confirmed by the court, and a conveyance executed to the purchaser under its order.—*McCully v. Chapman*, 325.
2. *Sale by administrator, in violation of order of court.*—Where an administrator violates the order of the Probate Court in making a sale of decedent's lands, and sells on a credit instead of for cash, the sale is in excess of his authority, and depends for its validity on the subsequent ratification of the heirs or devisees, or, in a proper case, its confirmation by the court of chancery.—*Id.*
3. *Same; parties to suit to enforce sale.*—Where an administrator files his bill to enforce a vendor's lien on lands of the decedent, sold by him, under order of the court, whether the sale be made pursuant to or in excess of the authority conferred—the sale not having been confirmed, and no conveyance having been made to the purchaser—the heirs and devisees must be made parties; and where the estate has been declared insolvent, creditors, whose claims have been filed and allowed, are also necessary parties.—*Id.*

LEGISLATIVE ENACTMENTS. See CHANCERY—CONSTITUTIONAL LAW—STATUTES.

1. Validity of, during the war.—(See *Confederate States*, 1.)

LIFE INSURANCE.

1. *Life insurance; its benefits and abuses.*—Life insurance, conducted on proper economic principles, is a prudential and valuable investment; but if premiums be adjusted on a fancy schedule, with a view of enriching corporations or furnishing undue compensation to a horde of employees, &c., the evils of the system exceed all benefits. In deciding the various questions arising in the dealings of such companies with policy holders, the court can not shut its eyes to abuses to which the business is subject, the fanciful and speculative representations often made by agents, and the technical and exacting conditions frequently contained in policies, to the prejudice of the assured.—*Piedmont & Arlington Life Ins. Co., v. Young*, 476.
2. *Policy of life assurance; construed.*—An ordinary life policy, payable on the death of the assured, in consideration of the annual premiums paid and to be paid by the assured while in life, for the benefit of the assured's wife and his children by her, bound the insurance company to

LIFE INSURANCE—*Continued.*

- pay the sum insured, upon the death of the party assured during the existence of the policy, "to the above named parties, to whose benefit this insurance shall ensure, whenever the same becomes due, their executors, administrators, &c." When the policy was delivered, assured's wife was living and had several children by her marriage with him. Between the delivery of the policy and the death of the assured, the wife and some of the children died. *Held*: 1. The wife and all her children by the assured, who were in life when the policy was taken out, or their personal representatives, are entitled to share in the insurance. 2. What would be the rights of a child of the assured, born after the delivery of the policy, is not decided. 3. Under an ordinary life policy an interest vests in the person for whose benefit it is taken out, when the policy is delivered, subject to be divested or forfeited on non-payment of the premium, as the policy may prescribe; and on the death of the beneficiary, either before or after the death of the assured, the insurance money goes by bequest or succession, as other personal assets of the beneficiary.—*Drake v. Stone et al*, 133.
3. *Conditions of policies; how construed.*—The conditions and duties of the assured in the policy, are, in general, to be liberally construed in favor of the insured and strictly construed against the insurer.—*Piedmont & Arlington Life Ins. Co. v. Young*, 476.
 4. *Responsibility for acts of agent; failure of notice*—Where insurance companies transact business through agents, at a distance from the home office, they are bound by the acts of such agents within the general scope of the business, and can not avoid responsibility by instructions, limiting their agent's authority; not brought to the notice of persons dealing with them.—*Id.*
 5. *Verbal notice; when sufficient.*—Where application or notice is required to be in writing, verbal notice will be sufficient, unless timely objection be made thereto.—*Id.*
 6. *Testimony of table-rates; when inadmissible.*—Where a policy shows on its face that it is of the class called "participating,"—especially where the assured so understood it at the time it was obtained—testimony of table-rates of the company for premiums of other kinds of policies, is inadmissible to show that the rate of premium paid was that fixed for a different kind of policy, when it is not shown that such table-rates were brought to the notice of the assured.—*Id.*
 7. *When insurer estopped from denying kind of policy, &c., held by assured.*—Where an assured had obtained what he believed to be a "participating" policy, and verbally notified the agent, some time before the next premium fell due, that he wished a paid-up policy, and the agent stated, "it was all right, and he would attend to it," and several times afterwards being approached by the assured, said "it would be attended to," the company is estopped from saying that the assured did not hold a participating policy, and that the one held by assured had, by its terms, been forfeited for non-payment of premiums.—*Id.*
 8. *Assignment of policy; when not void.*—Where a policy was issued on the life of a debtor for the benefit of a firm, as his creditors, and provided that it should not be transferred without the approval of the company, a transfer by one partner, of his interest, to another partner, will not avoid the policy nor defeat the transferee's right of action therein, especially where, by the death of the transferring partner, the legal title is cast on the plaintiff as surviving partner.—*Id.*
 9. *Necessity of enacting laws on this subject; legislative attention solicited.*—The court avails itself of this occasion to invite the attention of the legislature to the necessity of enacting laws protecting policy holders against the fraud and insolvency of insurance companies, by requiring them, as a condition of doing business, to maintain a reserve of assets, sufficient in amount, at a fixed rate of interest, to cover their liabilities, as is now provided in some of the States, or in such other mode as its wisdom may suggest.—*Id.*
 10. *Same.*—The court also refers to the need of amending the laws against

LIFE INSURANCE—Continued.

- obtaining money by false pretenses, so as to prevent and punish the reckless misrepresentations so often indulged in by soliciting agents.—*Ib.*
11. *Same; explanation.*—Lest its language may be misunderstood, the court adds that, "it found no evidence of fraud or misrepresentation by the agent in this case, nor does the record furnish evidence of intentional wrong on the part of the company."—*Ib.*
 12. *Physician, opinion of, as to cause of death of assured; when admissible.*—A physician who attended the assured in his last illness, may give his opinion as to the disease with which he was afflicted, and as to the cause of his death.—*Mobile Life Ins. Co. v. Walker*, 290.
 13. *Examining physician of insurance company; what can not state.*—A life insurance company, when sued upon a policy issued by it, can not show by its physician, who, upon the report of the examination of the assured by another physician, had recommended the acceptance of his application, and upon whose recommendation the policy had been issued, whether he would have recommended the policy if he had known the assured was afflicted with lead poison, the assured not having answered, or been required to answer, upon that point in his application.—*Ib.*
 14. *Residence; meaning of, in application for, and policy of life insurance.*—A policy of life insurance, and the application for it, must be construed together, and in the absence of something showing a contrary intention, words used in one must receive the same meaning when used in the other. Thus construed, in this case, the word *residence* in the question propounded to the assured, intended to signify his place of permanent rather than of temporary abode; in the sense of domicile, rather than of mere *inhabitaney*—and this being truly stated, the fact that the assured sojourned some year or two in another State did not render his answer untrue.—*Ib.*

LIMITATIONS; STATUTES OF. See **ESTATES OF DECEDENTS, AS TO BAR OF STATUTE OF NON-CLAIM.**

1. Limitation of prosecution.—(See *Criminal Law*, 87.)
2. Limitation, barring suit by counties for taxes.—(See *Revenue Laws*, 12).

MANDAMUS.

1. Mandamus is not a revisory writ, and cannot be legally employed to prevent the execution of an erroneous decree; this is the office generally of a writ of *supersedeas*.—*Ex parte Brown*, 536.
2. *Interlocutory ruling; no appeal from; mandamus proper remedy.*—There being no final judgment, an appeal does not lie from the interlocutory ruling in a suit by petition for rehearing under section 3161 of the Code of 1876, nor will such appeal be aided by the final judgment in the original cause; *mandamus* is the proper remedy if the ruling was incorrect.—*Heftin v. Rock Mills Manuf'g & Lumber Co.* 613.

MARRIAGE. See **HUSBAND AND WIFE.**

1. *Marriage; power of State over.*—Marriage is not a mere contract, but a social or domestic institution, upon which are founded all society and order, to be regulated and controlled by the sovereign power for the good of the State; and the several States of the Union, in the adoption of the recent amendments to the Constitution of the United States, designed to secure to citizens rights of a civil or political nature only, did not part with their hitherto unquestioned power of regulating, within their own borders, matters of purely social and domestic concern.—*Green v. The State*, 190.

MAXIMS.

1. *Caveat emptor; to what, maxim applies.*—The maxim, *caveat emptor*, applies to judicial sales; the purchaser has no ground of complaint if the title

MAXIMS—Continued.

sold proves valueless, and can not defend an action at law for the purchase-money, because of misrepresentations of the administrator in making a sale of land under order of the court of probate.—*Fore, adm'r, v. McKenzie*, 115.

2. "One seeking equity must do equity," is an inflexible rule.—*Smith et al. v. Murphy et al.* 630. Also, see MORTGAGE, 10.

MECHANIC'S LIEN. See RETROACTIVE LAW.

MISCEGENATION. See CRIMINAL LAW, 89, 90.

MISUSER OR NON-USER. See CORPORATIONS.

MOBILE.

1. *Mobile, general guardian; liability of sureties.*—Under the act "authorizing appointment of a general administrator and general guardian for Mobile county and other purposes," approved December 14, 1859, an official bond given by the person appointed, conditioned "that he shall faithfully administer all estates which may come into his charge as general administrator and guardian," no matter how often he may be reappointed general administrator and guardian, binds the sureties on each bond for only the administration of estates committed to their principal for the term for which their bonds were executed.—This rule, however, does not apply to bonds given under §§ 2405-7 of the Code.—*Buckley v. McGuire et als* 226.

MISREPRESENTATION. See RECOMMENDATION—FRAUD, 2, 3.

MONEYED DEMAND.

1. Term "moneyed demand" embraces what, in statute requiring *non-suit*, &c.—(See *Non-suit*, 1).

MORTGAGE.

1. *Equitable mortgage; what constitutes; rights of parties under.*—The owner of lands conveyed them to a railroad company, expressly reserving in the deed what was denominated a "vendor's lien," to secure notes given for the purchase-money, taking back at the same time from the purchasers, an irrevocable power of attorney, authorizing the vendor or transferees to whom he should negotiate the notes, as attorney in fact of the company, and in its name, to sell from time to time so much of the property as should be necessary to pay the notes at maturity, or the interest thereon, which was payable semi-annually. Afterwards, and before the maturity of the notes, creditors of the railroad company, having notice of the deed, holding bonds secured by mortgage covering after acquired property, of prior date to the conveyance of the lands, but inferior to the lien reserved, obtained a decree of foreclosure, under which they purchased all the property of the railroad, making payment in bonds thus secured, and thus came into possession of the lands. The purchasers used the lands, collected rents, and refused to pay interest, although demanded of them, remaining in possession after the maturity of the notes, without offering to pay either. At that time the lands were insufficient to pay the amount due upon the purchase-money, and the original vendor and vendee were both insolvent. The transferee of some of the notes thereon filed his bill to enforce the lien, and sought a decree against the last purchasers for use and occupation during the time they were in possession. *Held*:
 1. The vendor and his transferees of the notes acquired an equitable mortgage on the lands.
 2. The bondholders were purchasers of the property for value, and lawfully in possession; but acquired only the equity of redemption, remaining after the reservation of the lien and the execution of the power of attorney; and in the absence of some stipulation or agreement to that effect

MORTGAGE—Continued.

- in the contract of purchase, were not liable for the mortgage debt or interest thereon.
3. The purchasers were not liable for rents, or for use and occupation, not exceeding interest maturing during the possession, prior to a demand upon them for possession of the property, or its being taken from them by appointment of a receiver.—*Hall et al. v. Mobile & Montgomery Railway Co.*, 10.
2. *Same*; lien on lands; when created by notes; nature of lien.—A lien on lands is created by promissory notes when the land is charged with the payment; and, in equity, the nature of such charge is that of an equitable mortgage.—*Bryant, adm'r, v. Stephens, et al.*, 636.
3. *Exchange of lands*; lien for the excess.—When A makes a contract with B for the exchange of lands, and the lands of A exceed in value those of B, and B agrees to pay A for the excess, A, though having conveyed his land to B, will have a lien on all the land conveyed, for the excess which is considered but purchase-money owing him by B. If, however, the contract be for a sale of the excess, and an exchange of the other land, A would have an equitable lien for the purchase-money, only on the part or excess purchased by B.—*Id.*
4. *Priority of mortgage over equitable lien.*—Where A exchanged or sold lands to B, for the excess of which B executed his note to A, after which B executed a mortgage of the same premises to C, such mortgage has priority over an equitable lien created by two notes subsequently executed by B to A, in lieu of the original note and in alteration of the original contract. And it is immaterial whether the consideration of C's mortgage be an antecedent or presently contracted debt.—*Id.*
5. *Lien on several kinds of property*; right of party having lesser lien.—If a creditor has two funds to which he may resort for payment, or has a lien on two parcels of land, or on land and personal property, and another creditor has a lien on only one of the funds or of the parcels of land, or on the land and not the personalty, the latter may compel the former to resort to the funds or property on which the latter has no recourse, and exhaust it before subjecting the other. If, through the former's negligence, he fails to subject any part of the personalty to the payment of his debt, he must bear the consequences; and the value of such property should be ascertained and applied to the extinguishment of his debt, in relief of the lands, for the benefit of the other creditor.—*Id.*
6. *What is a conditional sale and not a mortgage.*—Where there is no debt or obligation to pay, there can be no mortgage. Consequently, when the grantor conveys by absolute deed, with covenants of warranty, and takes from the grantee an obligation in the form of a penal bond, which recites the conveyance, and also that the parties have agreed that the grantor may have the right and privilege to redeem at a stipulated price, and within a specified time, and it is conditioned that the grantee will convey according to the agreement, but does not bind the grantor to redeem, according to the agreement, the transaction is a conditional sale and not a mortgage, although it originated in a loan of money.—*Haynie, adm'r, v. Robertson*, 37.
7. *Party having prior lien*; what sufficient answer to objection that State is not made a party.—The presence of a prior mortgage, or a party having a prior lien, who is not subject to the jurisdiction of the court, and the validity of whose incumbrance is not disputed, may be dispensed with; and where such prior incumbrancer is a State which can not be made a party, this is a sufficient answer to the objection that it is not made a party to a suit asserting no adverse claims to the rights of the State.—*Kelly et al. v. Ala. & Cin. R. R. Co.*, 490.
8. Usury; bill for relief of mortgage on account of.—*Rogers et al. v. Torbul et al.*, 523.
9. *Mortgagees*; title of, who can not set up against mortgagor or his heir.—After default in the payment of the mortgage debt, the legal estate in the mortgaged property vests unconditionally in the mortgagees, and there

MORTGAGE—Continued.

- remains in the mortgagor only an equity of redemption ; yet, as against all the world, except the mortgagee and his privies in estate, the mortgagor or his heir at law may be regarded as the owner of the fee, and strangers can not set up the mortgage to defeat a recovery in ejectment by him.—*Denby v. Mellgren*, 147.
10. *Mortgage in possession ; what must do when seeking to foreclose.*—A mortgagee or his assignee, who is in possession, may come into equity for a foreclosure, although he is clothed at law with the legal title; but when he comes into equity for that purpose, he must offer to do equity by accounting for rents and profits.—*Id.*
 11. *Assignee of mortgage debt, when necessary party to bill for foreclosure.*—Where a mortgage debt is assigned by parol, the legal title remaining in the mortgagee, he is a necessary party to a bill for foreclosure filed by the assignee.—*Id.*
 12. *Mortgage ; twenty years possession by, presumption as to.*—Where, prior to the year 1850 the mortgagee took possession of the mortgaged premises, and after occupying them for some time, conveyed absolutely to another, and the possession of the mortgagee and his vendee continued for more than twenty years, without interruption or claim from the mortgagor or his heirs, a sale of the property and conveyance under the mortgage, or almost any thing else, necessary to give repose to the title of the purchaser, will be presumed.—*Dawson v. Hoyle*, 44.
 13. *Charter of railroad company, and mortgages construed.*—The charter of railroad company empowered it, among other things, to construct and operate a railroad between the cities of Mobile and New Orleans, and to require and hold such real property "as may be necessary and convenient, for the construction, maintenance and management of the railroad," and also to acquire "any steamboats, piers, wharves and appurtenances thereunto belonging, that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage, in connection with said railroad."
- In deeds of trust, executed by the railroad corporation, the words of conveyance were qualified by clauses like the following : "The lands occupied by said railroad, or hereafter acquired, owned and occupied . . . including all depots, &c., now owned and occupied, or hereafter acquired in connection with said portion of said railroad, situate upon or lying within the limits of said cities, or upon or adjacent to said portion of said railroad, and the route and line thereof." In another mortgage or deed of trust, the conveyance was qualified as follows : "All depots, station-houses, wharves and warehouses . . . now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad, together with all steamboats, and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." *Held*,
1. The charter authorizes the corporation to acquire and hold property to be used in the construction, maintenance and operation of the road, or in connection therewith ; but not the acquisition of property not needed or used, for one of these purposes, or in connection with such purposes.
 2. The mortgages conveyed only such property, real or personal, as was useful and necessary and employed in the construction, maintenance, operation, repair and preservation of said railroad; and property acquired and owned, and not used or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, did not pass.
 3. Property bought of an opposition steamship line, not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, was not authorized to be acquired by the charter, and not covered by the granting clauses in the mortgages.—*Morgan & Raynor, Trustees, v. Donovan*, 241.
14. *Railroad companies; power to borrow money and secure its payment by mortgage.*—Corporations created for the construction of railroads, in the ab-

MORTGAGE—Continued.

- sence of limitation or restraint by statute, have power (at common law) to borrow money, and make bills, bonds or promissory notes for its repayment, and may mortgage its real and personal property to secure debts thus created.—*Kelly et al. v. Trustees Ala. & Cin. R. R. Co.* 489.
15. *Mortgagors, priority of payment; error without injury; what not cause for reversal.*—Where mortgagors and their lands are bound in any event for the payment of debts to different persons, it is no injury to them to give priority to either debt; hence they can not complain of a decree condemning lands for satisfaction of a mortgage, on the ground that it erroneously gave one debt a preference over the other—although the case would, perhaps, be reversible, if a party *actually aggrieved* had complained.—*Bethune et al. v. Oates*, 460.
 16. *When mortgage paramount to execution lien.*—A mortgage executed after an execution lien had been created and allowed to lapse, and before such execution lien was renewed, is a paramount lien to such a renewed execution lien.—*Gamble, Ex'r, v. Fowler et al.* 578.
 17. *Mortgage of homestead under exemption act; separate examination of wife.*—A mortgage of the homestead under the act "to regulate property exempted from sale and the payment of debts," (Acts 1872-3, p. 64), required the voluntary signature and assent of the wife, which could be shown only by her examination, touching the same, separate and apart from her husband.—*Balkum v. Wood*, 642.
 18. *Same; when mortgage void; subsequent acknowledgment no avail.*—A mortgage of the homestead, without the formalities required by such act, is absolutely null and void; and, it not being regarded an instrument imperfectly executed, which may be afterwards perfected, a subsequent acknowledgment will not validate it and can have no retroactive effect. *Ib.*
 19. *Conveyance to be delivered when money paid, and mortgage to secure unpaid money; when operative; revestment in vendor; what operates as notice to intermediate purchaser.*—Where the owner executes a conveyance of lands, and deposits the same with an agent to be delivered to the purchaser when he complies with the contract, and executes a mortgage back to secure the unpaid purchase money, such instruments become operative only from the date of delivery; the title remains in the vendor until such delivery and *eo instanti* returns to him by the mortgage so as to preclude the interposition of any title or right in any other person; and the vendee's mortgage, if duly recorded within ninety days (Rev. Code, § 1657), operates as a notice of its contents to one purchasing in the interval between its delivery and record.—*McRae et al. v. Newman*, 529.
 20. *Same; what does not estop vendor from enforcing mortgage given by original vendee.*—In such a case, the mere fact that an attorney, while he held the deed to the original purchaser, as an *escrow*, wrote out a conveyance, at the instance of such purchaser, to a third person, who paid the purchase-money, without actual notice that his immediate vendor had not paid, does not estop the vendor from enforcing the mortgage of the original vendee, if recorded in due time—such second purchaser never making inquiry of the attorney, and the attorney not being informed as to the terms of payment agreed on between the original and second purchaser.—*Ib.*

MUNICIPAL CORPORATION.

1. *Municipal corporation; acts of; when liable in damage for ditching, &c.*—A municipal corporation does not act judicially, but its acts are administrative in the construction of ditches, &c., to drain the streets; and if in so doing it concentrates water and discharges it on adjoining lands, whereby the land is washed up and injured, it is responsible in damages for such injury.—*Mayor & Councilmen of Troy v. Coleman*, 570.
2. *Same; diverting water from streets; when liable in damages.*—If the corporate authorities of a town, in diverting water from their streets, discharge it by artificial means, in increased quantities and with col-

MUNICIPAL CORPORATION—Continued.

- lected power and destructiveness, upon the lands of others, the corporation is liable for damage thus occasioned.—*Mayor, &c., of Union Springs v. Jones*, 654.
3. *Permission of former owner to erect a conduit; when purchaser no cause of action.*—If the owner of a lot gives the corporate authorities, or their employees, authority to erect a conduit, or water escape, through it, in the manner in which it exists when the lot is sold by another, the purchaser has no cause of action so long as there is no change in the structure or increase in the flow of water.—*Ib.*
 4. *Measure of damage to present owner; what plaintiff can not show.*—Where the purchaser is not precluded from recovering by some act of the former owner, the measure of damages is the injury to the lot after he became owner; the difference in value of the lot between the time the conduit was erected and the suit brought, is not a proper criterion of damages; nor can the plaintiff show, in the absence of the averment of special damages, that by reason of the flow of water on the lot his tenant left the premises.—*Ib.*
 5. *Irrelevant question.*—A question in this case, whether "the water could have any other outlet through plaintiff's lot from the street, unless the Council was to make one," is irrelevant and is properly excluded.—*Mayor, &c., of Troy v. Coleman*, 570.
 6. *What good defense; rights conveyed by former owner.*—Evidence that "one of the sewers complained of, was put where it is at the request of a former owner," is admissible and is a good defense, because such former owner could not invest his alienee with greater rights than he himself had.—*Ib.*
 7. *Same; what will not preclude grantee from recovering damages.*—Such an injury being a nuisance, the mere fact that the former owner brought no action or made no complaint against it, will not preclude a purchaser from him of the right to recover for the damage he may suffer—if by the act of the grantor the lot had not been subjected to a servitude for an outlet to the water of which the streets should be relieved.—*Ib.*

NEGLECTANCE.

1. *Negligence of wounded man or nurses; when immaterial in murder.*—Where death is caused by a dangerous wound, the person inflicting it is responsible for the consequences, though the deceased might have recovered with the exercise of more prudence and with better nurses; and a charge is properly refused which instructs the jury, without regard to the character of the wound, that the prisoner can not be convicted of murder, although the wound was inflicted with malice aforethought, pursuant to a formed design to kill, &c., if the wounded person died from the gross carelessness of himself or nurses.—*Bowles v. The State*, 335.
2. *Railroad company; negligence by.*—Where a train of cars was moving backwards, within the limits of an incorporated town, while the deceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a look out, and the cars run over and killed the deceased, the company is guilty of negligence.—*Savannah & Memphis R. R. Co. v. Shearer, Adm'rs*, 672.
3. *Contributory negligence; defensive matter; burden of proof.*—In an action to recover damages for a wrongful act causing death, contributory negligence on the part of the deceased is defensive matter, and the burden of proving it rests on the defendant, unless the plaintiff's own testimony inculpates the deceased.—*Ib.*

NEGRO. See CRIMINAL LAW, 89—REMOVAL OF CAUSES.

NEW TRIAL. See CRIMINAL LAW, 106.

1. *Mere continuation of suit.*—An application for a new trial is a mere continuation of the original suit.—*Mills v. Long et al.* 458.

NON-CLAIM. See ESTATES OF DECEDENTS.

NON-RESIDENT. See DEPOSITION OF WITNESS, 2—EXEMPTIONS, 2.

NON-SUIT.

1. *Statute requiring non-suit ; extent of.* Term "moneyed demand"; embraces *what*.—The statute (R. C. §2678) requiring a non-suit against the plaintiff recovering less than fifty dollars unless he makes the prescribed affidavit, extends to every suit on a "moneyed demand"—which term embraces every demand arising out of contracts, express or implied, which, from their nature, enable the plaintiff to make affidavit that the amount sued for is actually due.—*Mills v. Long, et al.* 458.
2. *Error; without injury, what is.*—Where a cause is continued, as the judgment entry recites, "until the next term, with the express understanding that it is to be tried then, or dismissed from the docket," it may be dismissed on motion, at the second ensuing term, notwithstanding a continuance at the intermediate term; and if a judgment of non-suit is entered, instead of dismissed, this is error without injury.—*Stewart et al. v. Ross*, 264.

NOTARY PUBLIC.

1. *Notaries public; origin and duties of the office; constitutional and statutory provisions.*—Notaries are of ancient origin, long known to the civil and common law. Statutes have been enacted regulating the manner of their appointment, and to some extent defining their duties, which were formerly strictly ministerial—not clothed with judicial power, nor charged with judicial duty. The constitution merely recognizes the existence of the office and provides for the mode of filling it; it does not create the office.—*Carroll v. The State*, 396.
2. *Same; power of appointment by governor, civil and criminal jurisdiction conferred.*—Under the constitution, the governor has the power to appoint notaries public, conferring upon them only such powers as are appropriate to their office under existing law, or, in addition, the powers and jurisdiction of justices of the peace. In the latter case, the notary may exercise all the civil and criminal jurisdiction of a justice of the peace, as defined by statutes then existing, or thereafter enacted.—*Id.*

NOTICE.

1. *Verbal notice; when sufficient.*—Where application or notice is required to be in writing, verbal notice will be sufficient, unless timely objection be made thereto.—*Piedmont & Arlington Life Ins. Co. v. Young*, 476.

OFFICERS AND OFFICES. See AUDITOR—NOTARY PUBLIC.

1. Effect of proclamation of Governor Parsons on offices and persons holding office in Alabama at the end of the war.—(See *Confederate States*, 4, 5.)
2. Probate judge, or other officer, demanding fees, must point to some clear and definite provision of the statute authorizing the same.—*Tillman v. Wood*, 578.

OFFICIAL BONDS. See MOBILE.

OVERRULED CASES, AND HEREIN OF CASES CRITICISED, DISTINGUISHED, FOLLOWED, SUSTAINED, APPROVED AND RE-AFFIRMED.

1. *Andrews v. McCoy*, 8 Ala. 920, distinguished from *Lockhard v. Lockhard*, 16 Ala. 423, and explained in *Tubb v. Fort*, 283.
2. *Atkins v. The State*, present term—as to sufficient recital, in judgment entry, of oath administered to the jury—sustained by *Mitchell v. The State*, 417.

OVERRULED CASES, &c.—Continued.

3. *Atwood v. Wright*, 29 Ala. 346—in respect to the fraud or misrepresentation of an administrator making a sale—the principle in such case being confined to sales of personal property—held not applicable to, and distinguished from *Fore*, adm'r, v. *McKenzie*, 115.
4. *Bygger v. Hulchings*, 2 Stew. (Ala.) 445—in respect to presentation of claim against estate of decedent—reaffirmed by *Smith v. Fellows*, adm'r, 467.
5. *Blair v. The State*, 52 Ala. 341—in respect to sufficient recital in the judgment entry, of the oath administered to the jury—sustained by *Mitchell v. The State*, 417.
6. *Branch Bank of Mobile v. Strother*, 15 Ala. 51, 60—in respect to offer to pay amount actually due in bill seeking relief against usury—quoted and followed in *Rogers et al. v. Torbul, et al.* 525.
7. *Burns v. The State*, 48 Ala. 195—in respect to the constitutionality of § 4189, Code of 1876—overruled by *Green v. The State*, 190.
8. *Bush v. The State*, 52 Ala. 13—in respect to sufficient recital in judgment entry of oath administered to the jury—sustained by *Mitchell v. The State*, 417.
9. *Cases cited in Bishop's Cr. Law*—in support of the principle which constitutes the charge in consideration, as to what constitutes murder—held not to sustain Mr. Bishop's theory.—*Judge v. The State*, 406.
10. *Crist v. The State*, 21 Ala. 149, 150—in respect to sufficient recital in judgment entry, of oath administered to jury—sustained by *Mitchell v. The State*, 417.
12. *Davis Avenue Railroad Company v. Mallon*, 57 Ala. 168—as to motion to dismiss for want of security for costs—held unlike, in principle, to *Heflin v. Rock Mills Manu'g & Lumber Co.* 613.
11. *Dane v. McArthur*, 57 Ala. 448—declaring that judgments do not operate as liens—followed in *Gamble, Ex'r, v. Fowler et al.* 576.
13. *De Bardelaben v. The State*, 50 Ala. 180—in respect to what constitutes a sufficient recital in the judgment entry, of the oath administered to the jury—sustained by *Mitchell v. The State*, 417.
14. *Eduards v. The State*, 49 Ala. 334—in respect to sufficient recital in judgment entry, of oath administered to jury—sustained by *Mitchell v. The State*, 417.
15. *Ex parte Allen*, 55 Ala. 258—reaffirmed by *Ex parte Nettles*, 276.
16. *Ex parte Bryant*, 34 Ala. 270—in conflict with decision followed by *Ex parte Nettles*, 276.
17. *Ex parte Heflin*, 54 Ala. 95, adhered to in *Heflin v. Rock Mills Manu'g & Lumber Co.* 615.
18. *Ex parte McAnally*, 53 Ala. 495, followed in *Ex parte Nettles*, 276.
19. *Ex parte Weaver*, 55 Ala. 250, reaffirmed by *Ex parte Nettles*, 276.
20. *Ex parte Winston*, 52 Ala. 419—cited and followed in *Young et al. v. The State*, 379.
21. *Ex parte Wray*, 30 Miss. 673, severely criticised and disapproved by *Ex parte Nettles*, 275.
22. *Full v. McRae*, 36 Ala. 61—in respect to creation of partnership by certain contract—followed by *Robinson v. Bullock*, 618.
23. *Field v. The State*, 52 Ala. 348, approved by *Judge v. The State*, 407.
24. *Floyd v. The State*, 55 Ala. 61, cited and followed in *Young et al. v. The State*, 379.
25. *Hall v. The State*, 40 Ala. 698, 707—as to propriety of charge on absence of suspicion of other guilty agent—reaffirmed, and limited to cases involving certain circumstances—by *Childs et als. v. The State*, 349.
26. *Hepburn v. Griswold*, 8 Wall. (U. S.) 603 (which held the legal tender acts of congress not applicable to existing contracts) having been subsequently overruled by the U. S. Supreme Court, this court—where a judgment creditor having an execution levied on his debtor's land, in May, 1870, and instructed the clerk and sheriff to receive nothing but gold and silver or its equivalent, in satisfaction of the debt, and refused to receive legal tender notes except at 15 per cent. discount, which was then the premium on gold, and which the defendant refused to pay, but

OVERRULED CASES, Ac.—*Continued.*

- offered to pay them at 10 per cent. discount, which offer the plaintiff finally accepted—holds that the premium could not be recovered back, after the overruling of *Ilepburn v. Griswold*, *supra*.—*Troy v. Bland*, *adm'r*, 197.
27. *Johnson v. The State*, 47 Ala. 31, 62—in respect to sufficient recital in judgment entry, of oath administered to the jury—overruled by *Mitchell v. The State*, 417.
 28. *Knotts v. Tarver*, 8 Ala. 743—in respect to intervention of equity only when account not adjustable at law—quoted and followed in *Avery, adm'r*, *v. Ware et al.* 476.
 29. *Lockhard v. Lockhard*, 16 Ala. 423, distinguished from *Andrews v. McCoy*, 8 Ala. 920, and explained and distinction shown in *Tubb v. Fort*, 283.
 30. *Mayor & Councilmen of Troy v. Coleman*, present volume, 570—followed by *Mayor, &c. v. Jones*, 654.
 31. *Milton v. De Yampart*, 3 Ala. 648—in respect to liability of indorsers for indorsements in blank—quoted and followed in *Hooks v. Anderson*, 240.
 32. *Moore v. Smith*, 19 Ala. 774.—as to community of profits and loss in partnerships—distinguished from *McCrory v. Slaughter*, 234.
 33. *Moore v. The State*, 52 Ala. 424—in respect to sufficient recital in judgment entry of oath, administered to the jury—sustained by *Mitchell v. The State*, 417.
 34. *Moore v. The State*, 36 Miss. 137—as reasserted in *Beall v. The State*, 39 Miss. 721—disapproved by *Ex parte Nettles*, 275.
 35. *McNeil v. The State*, 47 Ala. 503—in respect to sufficient recital in judgment entry of oath administered to jury—sustained by *Mitchell v. The State*, 417.
 36. *McGuire v. The State*, 37 Ala. 161—in respect to sufficient recital in judgment entry of oath administered to the jury—sustained by *Mitchell v. The State*, 417.
 37. *Murphy v. The State*, 54 Ala. 178—as to sufficient recital in judgment entry of oath administered to the jury—overruled by *Mitchell v. The State*, 417.
 38. *Nashville & Chattanooga R. R. Co. v. Peacock*, 25 Ala. 229—in respect to liability of Railroad Company for killing live stock—held not to give a fair interpretation of the statute (Code of 1876, § 1704), *Zeigler v. South & North R. R. Co.* 595.
 39. *Paris v. The State*, 36 Ala. 235—as to the silence of the record in the matter of the service of the copy of indictment, and list of jurors, on defendant—followed in *Mitchell v. The State*, 420.
 40. *Price v. Lavender*, 38 Ala. 389—as to liability of indorser in blank—quoted and followed in *Hooks v. Anderson*, 241.
 41. *Robertson v. The State*, 43 Ala. 325—in respect to service of list of jurors upon the prisoner in a capital case—overruled by *Mitchell v. The State*, 420.
 42. *Smith v. The State*, 47 Ala. 545, and same case, 53 Ala. 486—as to sufficient recital in judgment entry of oath administered to the jury—overruled by *Mitchell v. The State*, 417.
 43. *State v. Boots Coleman*, present term—cited and followed in *Young et al v. The State*, 379.
 44. *Walker v. The State*, 49 Ala. 370—as to what is a sufficient recital, in the judgment entry of the oath administered to the jury—sustained by *Mitchell v. The State*, 417.
 45. *Wooster v. The State*, 55 Ala. 217—in respect to allowing *not pros.* to be entered as to one of several counts of an indictment, and not pass on demurrer to such count—reaffirmed by *Lacey v. The State*, 385.

PARTNERSHIP—

1. *Partnership; what constitutes.*—A joint undertaking and community of profit and loss, in the results of the business, constitute a partnership, although each partner retains the exclusive ownership of the separate property contributed by him to the use of the partnership.—*McCrory v. Slaughter*, 230.

PARTNERSHIP—*Continued.*

2. *Same*; what does not authorize partner to make or endorse promissory note in name of.—An ordinary partnership for planting or farming in the cultivation of land, does not involve the power of each partner to bind the partnership, or his co-partners, by making a promissory note in the partnership name.—*Id.*
3. *Same.*—In an agreement for such a partnership, an express stipulation that one partner shall furnish the mules necessary for the business, and that neither shall bind the other by contracts, excludes the inference of authority in the other to bind the partnership by the purchase of mules; and such power can not be implied as a matter of law, from the nature and purposes of the partnership.—*Id.*
4. *Same*; partnership not created by the contract; demurrer not aided thereby.—Upon principles settled in *Moore v. Smith*, (19 Ala. 774), and approved in *Phil v. McRee*, (36 Ala. 61), it is held that the contract in this case does not create a partnership; nor would the demurrer be aided if such relationship were created between the parties.—*Robinson v. Bullock*, 618.
5. Action brought by two partners; death of one, suit prosecuted in name of surviving partner.—*Davidson v. Weem's Ex'r.*, 187.
6. Action between parties; when remedy at law exclusive.—While it is a general rule that an action *ex contractu*, at law, is not maintainable between partners or partnership transactions, yet they may sue each other for the breach of distinct, positive stipulations binding on one only, contained in the partnership agreement. In such cases, the necessity of an account of the partnership transactions, not being involved, the remedy at law is generally exclusive.—*Robinson v. Bullock*, 618.

PAYMENT—

1. *Debt; where payable.*—In general, in the absence of something to the contrary in the contract, it is the duty of the debtor to make payment at the residence of the creditor—hence, where suit is brought here to recover a debt calculated according to the standard of a foreign country, and payable there, the verdict is properly directed for the amount of legal tender notes, at the time of the trial, required to put the amount due the plaintiffs at the place of their residence.—*Maberry v. Leach, Harrison & Forwood*, 339.
2. *Payment of debt by third party without request; when debtor liable to party paying.*—Although generally one man can not make another his debtor by paying his debt to a third party without his request; yet, if the debtor avails himself of the payment, by insisting on it as a satisfaction of the debt, he thereby becomes liable to the party making the payment.—*Denby v. Mellgren*, 147.
3. *Want of authority of administrator to make sale; who can not deny and defeat payment.*—One who enters and remains in possession of land under a sale by the administrator, cannot be heard to deny his authority to make it, and thus defeat payment of the purchase-money; but may, if the sale was in excess of his authority, on proper proceedings, compel creditors and heirs to elect its ratification and confirmation or rescission.—*McCully v. Chapman, Adm'r.*, 325.
4. *Assignees of notes given for lands; what determines priority of payment.*—Where the purchaser of lands executes several promissory notes for the purchase money, falling due at different times, and secured by mortgage or other instrument creating a lien on the lands for their payment, an assignment of the notes is an assignment *pro tanto* of the security for their payment. In the absence of an express stipulation to the contrary; and the several assignees are entitled to priority of payment, according to the date of their respective assignments, without regard to the time when the notes severally matured.—*Ala. Gold Life Ins. Co. v. Hall*, 1.
5. *Same.*—In such case, five of the notes being payable one, two, and three months after date, and eleven payable five years after date, with interest payable semi-annually; while the power of attorney to the vendor containing the power of sale authorized him "to sell and convey the real

PAYMENT—Continued.

estate, or so much thereof as may be necessary, upon default in payment of said notes, or either of them, or the interest due thereon, as aforesaid;" and further provided that "in case he shall have negotiated any of said notes before their maturity, so that some other person may be the lawful holder thereof, then said lawful holder of said note or notes may execute all the powers herein conferred on said" [vendor] "so far as they may apply to such note or notes held by such person, and in case of the death of said vendor, his executors or administrators may execute all the powers herein conferred, so far as they may apply to any of said notes remaining assets of his estate; and the said person conducting said sale or sales shall, from the proceeds of sale, first pay the expenses of sale, then the interest and principal on the notes then due in the order of maturity, rendering the surplus, if any, to the said" [purchaser]: *held*, that these stipulations did not change the principle above stated, so far as regards the notes last falling due.—*Ib*.

6. Promissory note; liability of promisor to pay assignee.—*Auerbach et al. v. Pritchett*, 451.

PENAL STATUTE. See CRIMINAL LAW, 107.

PERFORMANCE. See CONTRACTS, 6; SPECIFIC PERFORMANCE.

PLEADING AND PRACTICE. See ACTION; AMENDMENT; CHANCERY.

1. *Consolidation of suits; when properly ordered*.—Separate suits before a justice of the peace, between the same parties on promissory notes apparently given in the same transaction, are properly consolidated in the City Court, when brought there by *certiorari* upon a single petition and bond.—*Berry et al. v. Ferguson et al.*, 314.
2. *Complaint; sufficiency of*.—Where the marriage license mistook the names of the parties it authorized to marry, the man's name being written therein *J. L. Arnold*, instead of *D. L. Arnold*; and the female's name being written *Ellen*, instead of *Nancy Ellen*, and the license being issued to these identical parties, a complaint charging that the license was issued for the marriage of *D. L. Arnold*, by the name of *J. L. Arnold*, and *Nancy Ellen Mitchell*, by the name of *Ellen Mitchell*, averring the identity of the parties, is sufficient.—*Mitchell v. Davis*, 615.
3. *Plea in abatement; what demurrable*.—An unverified plea in abatement of plaintiff's action, averring a judgment in favor of defendant, in the same court, upon the same cause of action, between the same parties, and the pendency of the Supreme Court undetermined, on appeal of plaintiff in that, at the time the action was commenced, and showing that the former suit was between plaintiff's guardian for her use and defendant, is demurrable, because of inconsistency and want of a verification.—*Ellerbe, Adm'r, v. Troy, Adm'r*, 143.
4. *Plea; what demurrable*.—It is no answer to a suit brought by the intestate, and prosecuted afterwards by her administrator, to recover the amount due on a promissory note which had matured, and the interest on which was payable annually—that the intestate was entitled only to a life estate therein, and to the interest accruing thereon during her life; such plea admits a right of action in plaintiff when the suit was brought, and a right to recover interest; and as the note was past due, she could not split her cause of action for interest, and was entitled to recover both principal and interest.—*Ib*.
5. *Plea denying ownership of cause of action; requisites of*.—A plea denying plaintiff's ownership of the cause of action, must be direct and positive; and though in some instances affidavit of its truth may be made on information and belief, the qualification must be made in the affidavit, and not in the plea; if made in the plea, it is insufficient, and properly stricken from the files.—*Berry et al. v. Ferguson et al.*, 314.
6. *Detinue; what not pleadable in bar or abatement of*.—The failure to find and seize the property sued for, can not be pleaded in bar or abatement of an action of detinue.—*Morgan v. Wing*, 301.

PLEADING AND PRACTICE—Continued.

7. *Affidavit for attachment for tort; what defect in, not pleadable in abatement.* The special affidavit required by statute, as to the particular facts and circumstances of the claim, where an attachment is sued out to recover damages, is intended for the single purpose of enabling the officer granting the writ to determine the amount for which a levy must be made, and its sufficiency can not be tested by plea in abatement.—*Hadley et al. v. Bryers*, 139.
8. *Motion to dismiss for want of security for costs; waiver.*—If the defendant appears and pleads, or otherwise enters into defense, without moving to dismiss for want of security for costs, he thereby waives the objection, and admits himself rightly in court.—*Heflin v. Rock Mills Manufacturing & Lumber Co.* 613.
9. *Same; when such motion properly overruled.*—Where the defendant appeared before the circuit judge, in a suit by petition for rehearing, and moved to dismiss the petition and filed demurrers—pertaining solely to the sufficiency of the petition—and his motions and demurrers being overruled, applied to the Supreme Court for *mandamus* to compel the circuit judge to dismiss petition on the grounds contained in said motions and demurrers, and, after the Supreme Court denied the *mandamus*, he made a motion in the Circuit Court to dismiss for want of security for costs—*held*, that such last motion being made at such time, was properly overruled. (Case of *Davis Avenue Railroad Co. v. Mallon*, 57 Ala. 168, held to be unlike the present case in principle.)—*Ib.*
10. *When cause dismissed on motion; error without injury.*—Where a cause is continued, as the judgment entry recites, "until the next term, with the express understanding that it is to be tried then, or dismissed from the docket," it may be dismissed, on motion, at the second ensuing term, notwithstanding a continuance at the intermediate term; and if a judgment of non-suit is entered, instead of dismissed, this is error without injury.—*Stewart et al. v. Ross*, 264.
11. *Demurrer must be specific.*—A demurrer assigning as a ground "that said complaint does not contain a substantial cause of action," fails to specify any particular in which the complaint so failed, and therefore, under the statute, can not be sustained.—*Mayor and Councilmen of Troy v. Coleman*, 570.
12. *Demurrer without consequence.*—A demurrer which discloses no defect in the complaint, is without consequence.—*Ib.*
13. *Demurrer, ruling of court on; when not revisable.*—Rulings upon demurrer not shown otherwise than by recitals in the bill of exceptions, cannot be revised on appeal.—*Tuscaloosa Scientific & Art Association v. The State, ex rel. Murphy*, 54; *Sernau et al. v. Marx*, 608.
14. *Same.*—Where rulings upon demurrer are not shown by any judgment entry, the appellate court will not revise them, although the bill of exceptions recites what such rulings were.—*Morgan v. Wing*, 30.
15. *Deposition; motion to suppress; when too late.*—It is too late to make a motion for the first time to suppress an entire deposition, after the parties have expressed themselves ready for trial and announced satisfaction with the jury.—*Ib.*

POWERS.

1. *Powers in will; when sale under, not necessary inquiry.*—Where a bill does not seek to set aside sales made by an executor, but, on the contrary, ratifies and confirms them, the court need not inquire whether such sales were or could have been made under powers contained in the will, or under orders of the probate court.—*Morris et al. v. Morris*, 444.
2. *Power of sale under a will; what valid compliance.*—A testator provided in his will that his wife was to have the power of selling or exchanging any of the property devised, for cash or other property, provided the power be exercised by and with the advice of two persons named in the will; whereupon the wife, by ordinary deed of bargain and sale, duly attested, conveyed a lot to another, reciting in the conveyance that it was with the knowledge and consent of the two persons named in the

POWERS—Continued.

will, and such persons endorsed on the conveyance that they ratified and confirmed the sale—*held*, that the sale was a valid execution of the power in the will, and conveyed the title to the purchaser.—*Dawson et al. v. Ramser*, 573.

PROHIBITION.

1. *Prohibition; when does not lie.*—The writ of prohibition does not lie against a court or judge, except where there is no jurisdiction, or, there being jurisdiction for a particular purpose, where such jurisdiction is transcended.—*Ex parte Brown*, 536.
2. *Same.*—Whether or not the statutory lien given in favor of the State to secure bonds endorsed under the internal improvement aid law, can operate in favor of a holder of such bonds, and entitle him to be subrogated to such lien, is a question that can be decided in no other than a chancery court, and if the chancellor commits error in a decree thereon, it is not to be revised or corrected by a writ of prohibition.—*Id.*

PROCESS.

1. *Authority of attorney to superintend execution of process.*—In this State an attorney has a general authority to superintend and direct the execution of process issued on judgments which he has obtained for his clients, and may lawfully give such instructions to the officer executing it, as could be given by his client, and the process will protect him to the extent that it would protect his client.—*Smith et al. v. Gayle*, 600.

PROVISO.

1. *Meaning of term "proviso."*—(See *Constitutional Law*, 2.)

PUNISHMENT. See *CRIMINAL LAW*, 134.

RAILROADS. See *COMMON CARRIER*.

1. *Charter of railroad company, and mortgages construed.*—The charter of railroad company empowered it, among other things, to construct and operate a railroad between the cities of Mobile and New Orleans, and to require and hold such real property "as may be necessary and convenient, for the construction, maintenance and management of the railroad," and also to acquire "any steamboats, piers, wharves and appurtenances thereunto belonging, that the directors may deem necessary, profitable and convenient for the corporation to own, use and manage, in connection with said railroad."

In deeds of trust, executed by the railroad corporation, the words of conveyance were qualified by clauses like the following: "The lands occupied by said railroad, or hereafter acquired, owned and occupied . . . including all depots, &c., now owned and occupied, or hereafter acquired in connection with said portion of said railroad, situate upon or lying within the limits of said cities, or upon or adjacent to said portion of said railroad, and the route and line thereof." In another mortgage or deed of trust, the conveyance was qualified as follows: "All depots, station-houses, wharves and warehouses . . . now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad, together with all steamboats, and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." *Held*,

1. The charter authorizes the corporation to acquire and hold property to be used in the construction, maintenance and operation of the road, or in connection therewith; but not the acquisition of property not needed or used, for one of these purposes, or in connection with such purposes.

2. The mortgages conveyed only such property, real or personal, as was useful and necessary and employed in the construction, mainten-

RAILROADS—*Continued.*

ance, operation, repair and preservation of said railroad; and property acquired and owned, and not used or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, did not pass.

3. Property bought of an opposition steamship line, not with a view of employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, was not authorized to be acquired by the charter, and not covered by the granting clauses in the mortgages.—*Morgan & Raynor, Trustees, v. Donovan*, 241.
2. *Railroad companies; power to borrow money and secure its payment.* Corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power (at common law) to borrow money, and make bills, bonds or promissory notes for its repayment, and may mortgage its real and personal property to secure debts thus created.—*Kelly et al. v. Trustees Ala. & Cin. R. R. Co.* 489.
3. *State endorsement under Acts 1869-70, creating paramount lien; when railroad company may create subordinate lien.*—The internal improvement law, (Acts of 1869-70, p. 70,) while providing that the State shall have a first and paramount lien for its protection, when it has endorsed bonds under that act, does not forbid the railroad corporations from creating other liens on the property subordinate to such lien of the State; especially a lien to secure the bonds endorsed, &c.—*Ib.*
4. *Remedy by statute is given the State alone; when cannot be set up by purchasers of railroad.*—The remedies afforded by the statute are given to, and enforceable by the State alone; they can not be set up by the purchasers of the road, in a contest between them and the holders of endorsed bonds, secured also by the corporation's mortgage, to defeat the latter in foreclosing such mortgage, whatever might be their effect if the State were a party, and the holders of endorsed bonds, secured also by the corporation's mortgage, should seek to set up rights under the mortgage to embarrass the State in pursuing its remedies.—*Ib.*
5. *Resolution of directors, authorizing bonds to raise money; when includes earnings, profits, &c.*—Where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, road-bed, &c., "and on all the real and personal property now and hereafter belonging to the company,"—this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, &c.—*Ib.* 490.
6. *Receiver of railroad; appointment of; court of equity acts with caution; case demanding such appointment; effect of.*—Where the appointment of a receiver is asked to displace the exercise of corporate authority over a railroad, courts of equity act with extreme caution, and require a clear case of right, and of pressing necessity to induce their interference; but when the corporation itself has been declared bankrupt, with interest having accumulated on its bonds exceeding the value of the property mortgaged to secure them, and the purchasers of the equity of redemption at the assignees sale are in possession of the road and property mortgaged, receiving the incomes, profits and earnings of the road (which the mortgagee is entitled to take), and using the property for their own exclusive use and benefit, a clear case is presented for the appointment of a receiver; and such appointment would not be an interference with the corporate power and authority over the road, or a disturbance of corporate possession, but merely of that of the purchasers, who are using it for their own exclusive benefit.—*Ib.*
7. *Void endorsement by State; liability of railroad company, on bonds.*—Although railroad bonds be endorsed in contravention and fraud of the internal improvement law, and the endorsement be therefore void, this will not release the corporation of its liability for such bonds, which the corporation has secured by a deed of trust upon its property.—*Ib.*
8. *Railroad company; negligence by.*—Where a train of cars was moving backwards, within the limits of an incorporated town, while the de-

RAILROADS—Continued.

ceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a look out, and the cars run over and killed the deceased, the company is guilty of negligence. *Savannah & Memphis R. R. Co. v. Shearer, Adm'x.* 672.

9. *Act to prevent homicides, omitted from Code; subsequent act to supply omission; remedy against corporations for acts causing death.*—The act approved February 21, 1860, entitled, "an act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted; and the act of the same title, approved February 21st, 1872, having been passed to remedy the omission; section 1941 (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death, which said sections 1938, 1939, gave against individuals, now gives the same remedy as by the amending act of 1872. —*Id.*
10. *Section 1704, Code of 1876, not distinguishable from act of 1877; what not a fair interpretation of the language.*—The "act to define and regulate the liabilities of railroad companies," approved Feb. 11, 1852, and carried from the Revised Code into the Code of 1876, as section 1704, is not distinguishable in principle from the similar provision in the act of 1877; and although in the case of the *Nashville & Chattanooga R. R. Co. v. Peacock* (25 Ala. 229), it was held that the liability was not absolute, but that circumstances tending to show that the killing was the result of accident, which could not have been avoided by the exercise of skill and care, could be shown in defense, such is not a fair and natural interpretation of the language. —*Zeigler v. S. & N. R. R.* 594.
11. *Sections of the Code repealed by other sections.*—Likewise, it seems that the act of 1877, sections 1710–1715, inclusive, of the Code of 1876, necessarily superceded and repealed sections 1704 to 1709 of the same Code. *Id.* 595.
12. *When railroad becomes bailee.*—*Leigh Bros. v. M. & O. R. R. Co.* 165, note 3.

RECEIVER. See CHANCERY, 25.

1. *Receiver of railroad; appointment of; court of equity acts with caution; case demanding such appointment; effect of.*—Where the appointment of a receiver is asked to displace the exercise of corporate authority over a railroad, courts of equity act with extreme caution, and require a clear case of right, and of pressing necessity to induce their interference; but when the corporation itself has been declared bankrupt, with interest having accumulated on its bonds exceeding the value of the property mortgaged to secure them, and purchasers of the equity of redemption at the assignees sale are in possession of the road and property mortgaged, receiving the incomes, profits and earnings of the road (which the mortgagee is entitled to take), and using the property for their own exclusive use and benefit, a clear case is presented for the appointment of a receiver; and such appointment would not be an interference with the corporate power and authority over the road, or a disturbance of corporate possession, but merely of that of the purchasers, who are using it for their own exclusive benefit. —*Kelly et al. v. Trustees Ala. & Cin. R. R. Co.* 490.

RECOMMENDATION.

1. *Recommendation; when subjects person giving, to action, if false.*—A recommendation is not a guaranty; yet, if a person recommends to a wholesale merchant one who desires to purchase goods on a credit, knowing that the merchant is unacquainted with his financial condition and credit, good faith requires that his representations must be true; and if he knowingly or recklessly makes false representations, on the faith of which the merchant sells goods on a credit, and loses thereby, an action for damages lies against him. —*Einstein, Hirsch & Co. v. Marshall & Conley*, 153.
2. *Charge to jury; what free from error.*—In action against a writer of a letter

RECOMMENDATION—Continued.

of recommendation in these words, "Mr. H. is doing a small but *safe* business in this town; he wishes to buy several hundred dollars worth of groceries from you; he is good for all he buys, and you may safely sell him a bill; we recommend him to you, and hope you will treat him satisfactorily,"—the court having instructed the jury as follows: The effect and meaning of the letter is, that H. had, at the time, the ability to pay for all goods purchased by him; that he had at his command means, property or money, with which to pay for all goods he might buy from plaintiffs, and his ability was such as to make it safe for plaintiffs to credit him; that, in order to make a man good in the sense in which the word is here used, it is not necessary for him to have more property than is exempt from levy and sale under execution; but the word cannot be restricted to a willingness to pay when in funds, nor merely to the promptness with which he had previously met his obligations; but that he had, at the time, property or money with which to meet the amount for which he was recommended, or was in condition and could command the same when the debt fell due; that the term *several* means more than two, but not very many, and includes seven—*held*, that there was no error in these instructions.—*Id.*

2. *Same; when erroneous.*—A charge to the jury in these words: "If the jury believe from the evidence that the defendants represented to plaintiff, as alleged in the complaint, that he was good for all he might buy on a credit, they must then find from the evidence whether, at the time the representation was made, H. had property enough to enable him to pay the amount for which he was so recommended to credit, and that if he had not such property, he was not good for such amount"—asserts an inaccurate test of ability to pay, and is erroneous.—*Id.*

RECOUPMENT. See SET-OFF AND RECOUPMENT.**REHEARING AT LAW.**

1. *Motion to dismiss for want of security for costs; waiver.*—If the defendant appears and pleads, or otherwise enters into defense, without moving to dismiss the petition for want of security for costs, he thereby waives the objection, and admits himself rightly in court.—*Hefin v. Rock Mills Manuf'g & Lumber Co.* 613.
2. *Same; when such motion properly overruled.*—Where the defendant appeared before the circuit judge, in a suit by petition for rehearing, and moved to dismiss the petition and file demurrers—pertaining solely to the sufficiency of the petition—and his motions and demurrers being overruled, applied to the Supreme Court for *mandamus* to compel the circuit judge to dismiss petition on the grounds contained in said motions and demurrers, and, after the Supreme Court denied the *mandamus*, he made a motion in the Circuit Court to dismiss for want of security for costs—*held*, that such last motion being made at such time, was properly overruled. (*Case of Davis Avenue R. R. Co. v. Malbon*, 57 Ala. 168, held to be unlike the present case in principle).—*Id.*
3. *Interlocutory ruling; no appeal from; mandamus proper remedy.*—There being no final judgment, an appeal does not lie from the interlocutory ruling in a suit by petition for rehearing under section 3161 of the Code of 1876, nor will such appeal be aided by the final judgment in the original cause; *mandamus* is the proper remedy if the ruling was incorrect.—*Id.*

REMOVAL OF CAUSES TO UNITED STATES COURT.

1. *Removal of case to U. S. Court; when properly denied.*—In the absence of any hostile legislation, regulation or custom of the State interfering with the full rights of defendant in the City Court of Selma, he cannot have his cause removed to the Circuit Court of the United States because he is a negro; the act of Congress (Rev. Stats. § 641) does not authorize a removal under such circumstances.—*Thomas v. The State*, *et rel. Stegney*, 365.

RENT. See LANDLORD AND TENANT.

RESULTING TRUSTS. See TRUSTS AND TRUSTEES, 1-3.

RETAILING SPIRITUOUS LIQUORS. See CRIMINAL LAW, 108-110.

RETROACTIVE LAW.

1. *Retroactive law; when law not construed as.*—A law is not to be construed as having a retroactive effect, unless it is plain from its terms that the legislature so intended.—*Smith v. Kolb et al.* 645.
2. *Same; act amending mechanic's lien law.*—The act of April 19th, 1873, "to amend section 3101, 3102 and 3104 of the Revised Code," in relation to mechanic's liens has no retroactive operation.—*Id.*

RETROSPECTIVE LAW. See RETROACTIVE LAW.

RESIDENCE.

1. *Residence; meaning of, in application for, and policy of life insurance.*—A policy of life insurance, and the application for it, must be construed together, and in the absence of something showing a contrary intention, words used in one must receive the same meaning when used in the other. Thus construed, in this case, the word *residence* in the question propounded the assured, intended to signify his place of permanent rather than of temporary abode; in the sense of domicile, rather than of mere *inhabitation*—and this being truly stated, the fact that the assured sojourned some year or two in another State did not render his answer untrue.—*Mobile Life Ins. Co. v. Walker*, 290.

REVENUE LAW. See CRIMINAL LAW, 111-114.

1. *Same; bill for raising revenue, what is; must originate in the House; act approved February, 1870, declared unconstitutional.*—The bill to be entitled an act "To amend an act entitled an act to establish revenue laws for the State of Alabama," approved Feb. 9th, 1870, was a bill for "raising revenue," within the meaning of the constitution of 1868 (art. 10, § 15), which must originate in the House of Representatives; and it affirmatively appearing from the journals that said bill originated in the Senate, it is therefore declared unconstitutional and void. (MANNING, J.—of the opinion that the question as to whether the bill was properly introduced in the Senate first, was a question for the legislature and not for the courts.)—*Perry County et al. v. Railroad et al.* 547.
2. *Bill for raising revenue; definition; what included.*—A bill for raising revenue, as termed in the constitution, is a bill providing for the levy of taxes as a means of collecting revenue—hence, a bill for *reducing taxation*, if it provides for collecting revenue, is still a bill for "raising revenue."—*Id.*
3. *Revenue law of 1868; two distinct systems provided; assessments by auditor and assessor.*—Under the revenue act of 1868, two distinct systems of assessment are provided; one of general subjects of taxation, which is required to be made by the assessor; the other, of railroads and their rolling stock, which duty was cast on the auditor. There has been no law since before December 31st, 1868, which authorized the tax assessor or collector to assess railroads or their rolling stock.—*Id.*
4. *Same; no provision for county taxes; levy of county taxes.*—Under said act there is no such thing as an assessment of property for county taxes; the assessment is for State taxation alone. But after equalization of the assessment by the county board, the court of county commissioners levy a tax on the State assessments to provide for county expenses. State taxes are assessed, county taxes are only levied.—*Id.*
5. *Assessment necessary before collection of taxes.*—There must be an assessment, either pursuant to or adopted as a basis of the levy, before there can be a lawful collection of taxes.—*Id.*
6. *Escaped taxes; what are not; power to assess.*—In the acts of 1868, and 1875, "to establish revenue laws for the State of Alabama," are clauses

REVENUE LAW—Continued.

- which empower the assessor and collector, in certain conditions, to assess property which had escaped assessment during previous years; but those clauses give no authority to such officers in the cases under discussion, because, 1st, this is not property which has escaped assessment—these railroads having been assessed each year for State taxes; 2d, the assessor had no authority to assess railroads or their rolling stock, and hence it cannot be affirmed that they have escaped the assessor,—the auditor was the assessor, and they had not escaped him; 3d, as there is no authority to assess any property for county taxes, and the railroads were assessed for State taxes, they did not escape any assessment which the law authorized to be made.—*Ib.*
7. *Commissioners' court; no power to levy on railroads for escaped taxes.*—The court of county commissioners has no authority to levy taxes on railroad property, which has escaped them during previous years; such authority can only exist by statute, and the statute has not conferred it.—*Ib.*
 8. *Instructions by auditor to county officers; what not binding; liability of railroad for back taxes.*—Under the act approved Feb. 9th, 1870, above declared unconstitutional, the auditor instructed the tax collector of Perry county not to collect of the railroad company the county taxes for the year 1869, whereupon the tax collector did not collect such taxes; held, not to be an instruction as to any matter arising under the revenue law of 1868, and hence not binding on the county officer; and the railroad company is liable to pay the county tax levied for the year 1869.—*Ib.*
 9. *Provision of revenue law of 1875; what merely directory.*—Section 93 of the revenue law of 1875 providing that the county tax be levied in July, is merely directory, and such a levy made at the regular August term of the court of county commissioners is valid.—*Ib.*
 10. *Back taxes collectable; legal liability of tax payer; when enforced by common law action.*—Taxes may be collected under our statutes, after the expiration of the tax year in which they are assessed. The levy and assessment creates a legal liability on the tax payer to pay, which, according to a preponderance of authorities, may be enforced by an action at common law, unless the statutes provide an exclusive remedy.—*Ib.*
 11. *Duty of tax collector as to back taxes; limitation.*—It is the duty of the tax collector to ascertain and collect delinquent taxes assessed for precedent years, and this duty is limited by the acts of 1876-7 (now § 421 of the Code), to the extent that he reports insolvencies which are so allowed by the court of county commissioners, and these cannot be collected.—*Ib.*
 12. *Limitation barring suit by county, for taxes.*—A county is not exempt from the operation of statutes of limitation; but there is no such statute or provision applicable to a claim for taxes due, and there is no bar to such action short of the presumption of payment after the lapse of twenty years.—*Ib.* 548.
 13. *What acquiescence no bar to claim.*—That the commissioners' court acquiesced in the unconstitutional act of 1870, *supra*, (which remitted certain taxes assessed against the railroad company) by not requiring the tax collector to collect or account for the said company's tax the previous year, is no surrender of the claim, or bar to its present assertion.—*Ib.*
 14. *Tax sale; what law determines validity of.*—The validity of a tax sale depends upon the law in force when it is made.—*Oliver v. Robinson*, 46.
 15. *Same: what essential to validity of.*—Presumptions are not indulged in favor of the regularity of proceedings for the sale of land for non-payment of taxes; and the party claiming title under them, must show that all the substantial requirements of the law authorizing such sales, have been fully complied with.—*Ib.*
 16. *Same: what will excuse demand on owner, and search for personalty.*—Where the owner of lands remains *bona fide* unknown, after proper effort to ascertain the ownership, it will dispense with necessity for demand on him, or search for personal property.—*Ib.*

REVENUE LAW—Continued.

17. *Same*; when lands can not be assessed to "unknown owner."—Lands can not lawfully be assessed to "unknown owner," if, at the time of making the assessment, the officer had the means of ascertaining, by proper inquiry and search, who the owner was—such as the owner's occupation or open possession, or other information which would make known the owner: and having such means of information, he can not assess the lands to "unknown owner," and a sale under the assessment would be void.—*Ib.*
18. *Act of February 26th, 1872; what not a compliance with.*—Under the act of February 26th, 1872, "to establish additional revenue laws for the State of Alabama," which governed a tax sale made in July of that year, it is provided that "taxes not entered by the assessor in his assessment books, shall not be collected by the tax assessor, unless an assessment thereof shall have been made and entered by him, on the assessment books, both original and copy, under the supervision of the probate judge;" and an entry on a small "supplemental book" by the tax collector, of an assessment against property, to "unknown owner," which had escaped the assessor, no assessment having been made on the assessment books, original or copy, under the supervision of the probate judge, will not uphold such assessment, or a sale made under it.—*Ib.*
19. *Mistake in description of lands. when will avoid sale.*—If there is a material difference in the description of numbers of lands as assessed and as advertised—as a difference in the range in which they are situate—a purchaser at tax sale, will take no title to the lands thus misdescribed.—*Ib.*

REVERSION.

1. *Rent; when passes with reversion.*—Rent is an incident to the reversion, and whoever is entitled to the reversion when the rent falls due, is also entitled to the rent, unless it was reserved from the grant, or has been previously severed; and this, whether the assignment of the reversion is by act of the lessor, or by operation of law.—*Tubb v. Fort, 277.*

REVISED CODE. See CODE OF 1876.

1. §§ 1783-8. Transfer of stock of corporation on books of company.—*Nabring v. Bank of Mobile, 205.*
2. § 2678. Requiring non-suit against plaintiff recovering less than fifty dollars; extends to what; meaning of "moneyed demand."—*Mills v. Long et al. 458.*
3. § 2704. Competency of witness; to what beneficiary cannot testify; exceptions enlarged by § 3058 of the Code of 1876.—*Drew v. Simmons, 463.*
4. § 2860. Homestead exemption; what necessary to create the exemption.—*Wilson v. Brown et al. 62.*
5. §§ 3101-2, 3104. Mechanic's Lien.—Act to amend such sections is not retroactive.—*Smith v. Kolb et al. 645.*
6. § 3470. Decree of Chancellor in vacation—repealed.—*Rogers et al. v. Torbut et al. 523.*
7. § 3618. Prohibiting sale of spirituous liquors without license—not repealed by the revenue act of 1868.—*Sanders v. The State, 371.*

SALES. See VENDOR AND PURCHASER.

1. *Sale of lands by register; when not set aside as being premature, or because decree fails to designate place of sale.*—In a suit in chancery to subject lands to the payment of debts, a consent decree was rendered in June, 1875, ascertaining the amount of indebtedness entitled to a lien on the land, and directing that the register proceed "upon or after the 15th day of November next, to sell the lands for cash at public outcry to the highest bidder, after first giving notice of the time and place, and terms of sale, by publication" in a designated newspaper for three weeks, &c. The decree also contained this further stipulation: "If, before the 15th day of November, 1875, the defendants shall pay the costs of this suit, and \$200, to be applied *pro rata* on debts due complainants, then the

SALES—*Continued.*

sale of said lands shall be stayed until the 15th day of November, 1876, when the sale shall take place upon the same terms and conditions as above provided, unless the defendants shall before that time pay" another given sum, &c. The decree further directed, if the register should fail to advertise and sell the lands "on any of the days herein mentioned on which he is directed to sell, he shall do so as early thereafter as convenient, and if the defendants fail to pay any of the amounts herein specified, there shall be no further delay," &c. The register having first made publication as directed in the order, &c., exposed the lands for sale at public outcry at the court-house door of the county in which the lands were situate, and the court was held, on the 15th day of November, 1875, and executed a conveyance to the purchaser, who was the highest bidder. Upon the coming in of his report showing these facts, and certifying the failure of the defendants to comply with the terms of the order of sale, the defendants excepted to the report, &c., because the sale was prematurely made, and because no place of sale was designated in the decree, and the chancellor refused to confirm the report and set aside the sale, on the ground that it was prematurely made. *Held:*

1. The effect of the stipulation for a stay of sale was to confer on defendants the right to a further stay to a given day, beyond that fixed in the order, upon making payment as therein provided "before the 15th day of November, 1875," and not having made payment before that time, a sale on that day (proper advertisement first having been made) was authorized by the decree; and although defendants had the legal right, independent of the stipulations of the decree, to stop the sale at any time before it was actually made, upon paying the debt and costs, this right, in the absence of such payment or tender, could not affect the validity of the sale made on the day named in the decree.
2. A sale of lands, made after due advertisement and in the usual manner of judicial sales, at the court-house door of the county where the lands lie, will not be set aside, merely because the decree is silent as to the place where the sale is to be made.—*Hooper v. Young et al.* 585.
2. *Sale of cotton, what part of contract for.*—When a contract for the sale of cotton is made in a city or town in which a board of trade is organized, having rules regulating the sale of cotton, and the purchaser, being informed of these rules, does not dissent or object to them, but proceeds with the contract, those rules became a part of it, as if incorporated into it by express stipulation, although they have not existed so long, or been known and acted on so generally, as to become binding as a custom or usage of trade.—*Leigh Bros. v. Mobile & Ohio R. R. Co.* 165.
3. *Same; what necessary to constitute.*—To constitute a sale, the parties must mutually assent that the property in the thing sold shall pass to the purchaser. A contract which confers on the party proposing to buy a right to inspect, examine and re-weigh the cotton within a specified time, and, on paying or tendering the price within a specified time, to demand a transfer of the ownership and possession, and also confers on the seller a corresponding right to demand such inspection, examination and re-weighing within the prescribed time, is not a sale, but an executory agreement for a sale, and does not pass the title of the cotton to the purchaser.—*Id.*
4. *Same; effect of order by seller to warehouseman.*—In such a case, a written order by the seller to the purchaser, directing the warehouseman, with whom the cotton was stored, to deliver it to a railroad company, for inspection and examination by the purchaser, on his paying the storage, does not pass the title to him nor change the character of the original contract between the parties; but the railroad company becomes the bailee of the seller, as between him and the purchaser.—*Id.*
5. *Sale of chattel by one having no title; rule as to; exceptions to.*—The general rule is, that a sale or pledge of a chattel by a person, who, though he has possession, has no right of property, and no authority to sell, confers no title as against the true owner, although the purchaser pays a valuable consideration or advances money in good faith, and without

SALES—Continued.

- notice of the title of the true owner; but there are several recognized exceptions to this rule.—*Id.*
6. *Same.*—In the case of an immediate sale, under which the purchaser takes possession, with a condition annexed, that on his failure to pay the price at a future day the vendor may reclaim the goods, or a stipulation that the title shall remain in him until the price is paid, the title of a sub-purchaser, without notice of the condition or stipulation, will prevail over that of the vendor; but this exception to the general rule, which is founded on the policy of the registration laws, is confined to cases where there has been an actual sale, as well as a change of possession.—*Id.*
 7. *Same.*—Another exception is, where the seller parts with his property under such circumstances of fraud as will authorize him to reclaim it from the purchaser; yet, if there has been an actual sale, although induced by fraud, the title of the sub-purchaser for valuable consideration without notice, will prevail over that of the vendor.—*Id.*
 8. *Same.*—Another exception is where the owner of goods has, by his own act or consent, given another such evidence of a right to sell, or otherwise dispose of them, as according to the customs of trade or the common understanding of the world, usually accompanies the authority to sell or dispose of goods; but to bring a case within the exception, the owner must do something more than merely entrust another with possession of his goods.—*Id.*
 9. *Conditional sale; what constitutes.*—Where there is no debt or obligation to pay, there can be no mortgage. Consequently, when the grantor conveys by absolute deed, with covenants of warranty, and takes from the grantee an obligation in the form of a penal bond, which recites the conveyance, and also that the parties have agreed that the grantor may have the right and privilege to redeem at a stipulated price, and within a specified time, and it is conditioned that the grantee will convey according to the agreement, but does not bind the grantor to redeem, according to the agreement, the transaction is a conditional sale and not a mortgage, although it originated in a loan of money.—*Haynie, adm'r, v. Robertson, 37.*
 10. *Sale under venditioni exponas.*—(See *Venditioni Exponas.*)

SECURITY FOR COSTS. See **FEEs AND COSTS**, 8, 9.

SELMA.

1. *Charter of City of Selma providing for suits before justices, for unlawful detainer; what not cause for dismissing appeal.*—The provisions of the charter of the city of Selma, declaring the person in possession of property sold for city taxes, who refuses to deliver it to the purchaser, "shall be guilty of unlawful detainer, and the purchaser may institute suit before any justice of the peace, to recover possession," if valid, about which no opinion is expressed, are not to be construed as subjecting the proceeding, thus authorized, to the rules which regulate the action of unlawful detainer, between landlord and tenant, or where only the right of possession is involved; the proceeding authorized by the charter, partakes more of the nature of ejectment, or the statutory real action, than of unlawful detainer, and is governed by the general rules applicable to the former class of actions; and there must of necessity be an inquiry into the merits of the title; and where judgment is rendered in the justice's court against the tenant, the landlord may intervene on appeal. Where judgment is rendered against the tenant and the landlord appeals to the Circuit Court, the appeal will not be dismissed, or the cause stricken from the docket, because the tenant did not appeal; or because a bond, in compliance with the statute, was not given, if the appellant is able and willing to give a proper bond.—*Ex parte Webb, 109.*
2. *City court of Selma; duty of appellate court on reviewing finding on facts.*—Under the statute establishing the city court of Selma, there can be no presumption in favor of its findings on facts in civil cases tried without

SELMA—Continued.

the intervention of a jury, when brought before this court on appeal; and if the appellate court finds error of law or fact in such judgment, it must reverse and render judgment, or remand the cause, as seems proper in the particular case.—*McCrary v. Slaughter*, 230.

SEPARATE STATUTORY ESTATE. See **HUSBAND AND WIFE.****SET-OFF AND RECOUPMENT.** See **CORPORATIONS, 12.**

1. *Set-off; plea of, what evidence does not authorize.*—A plea of set-off for "moneys collected" for insurance on goods shipped plaintiff and not accounted for, etc., interposed to an action against defendant upon account, does not authorize any evidence or question as to want of diligence on the part of the plaintiff in not obtaining the part of the shipment not lost, and on which insurance was not collected.—*Mayberry v. Leach, Harrison & Furwood*, 339.
2. *Recoupment, defense of; what confined to.*—The defense of recoupment is confined to matters arising out of, or connected with the transaction which forms the basis of the plaintiff's claim; and the court properly instructs the jury to find against the plea, if it be shown that the matters upon which it rested do not arise out of, and are unconnected with the matters upon which the plaintiff's action is based.—*Ib.*

SHERIFFS.

1. *Sheriff; when onus lies on, to show diligence.*—Where a sheriff, having process in his hands for that purpose, fails to levy on property in possession of the defendant, or, having levied, discharges the levy without selling, and without making the money on the execution, the onus is on him to show a legal excuse for his conduct.—*Wilson v. Brown et al.*, 62.
2. *Same; when not liable for releasing property not exempt.*—A sheriff can not be held liable for discharging the levy of execution on property which was claimed as exempt, on the ground that plaintiff's debt was contracted before the enactment of the exemption law, unless it be shown that the sheriff had notice, actual or implied, of that fact.—*Ib.*

SLANDER.

1. *Attempt to commit offense, misdemeanor; charge of, actionable.*—The attempt to commit a felony or misdemeanor, is a misdemeanor; an attempt to commit larceny involves moral turpitude, and such offense is indictable and punishable by fine, imprisonment, or hard labor; hence, a charge of such offense is actionable *per se*.—*Berdeaux v. Davis*, 611.
2. *Count in action for slander; what not demurrable.*—In an action for slander, a count averring that the defendant falsely and maliciously charged the plaintiff, in the presence of others, as having "tried" to steal, &c., "but could not," is equivalent to having charged him with an "attempt" to commit larceny, &c., and is not demurrable on that ground.—*Ib.*
3. *Action for slander; what may be shown in defense.*—In an action for slander in falsely and maliciously charging one with having committed a crime, the defendant may show the circumstances, in reference to which the words were spoken, to negative the intention to impute crime, which the words themselves may import.—*Sternau et al. v. Marx*, 608.
4. *Same; what material; words construed by court and jury.*—It is not the meaning of the person using the words, but the sense in which the words are understood by the parties to whom spoken—taking them in their ordinary signification—that is material; and it is for the court and jury to construe the words; and—the words being unambiguous—a witness can not be allowed to state what meaning the defendant intended to convey by them.—*Ib.*
5. *Intention of party; how arrived at, if material.*—When the intention of a party is material, it must be collected from the act done, in connection with the surrounding circumstances and accompanying declarations. It is an inference drawn by the jury, and not a fact to which a witness may testify.—*Ib.*

SOLICITOR. See **CHANCERY**, 21.

1. Fee of, in lottery cases.—(See **Criminal Law**, 88.)

SPECIFIC PERFORMANCE.

1. *Specific performance ; when will not be decreed.*—In 1854, S. gave a writing to L. & N., acknowledging the receipt of \$300 in part payment of "ten acres of land," sold by S. to L. & N. at \$700, the writing also stating "the balance of the money due me is to be paid when I can give them satisfactory titles, which I bind myself and my heirs to do." This writing was attested by two witnesses. Shortly afterwards, L. & N. entered upon ten acres of land, of which Schuessler was in possession, and occupied and used it until the year 1871, when they sold the fences and left the land vacant, and Schuessler re-entered. Although Schuessler could not produce a satisfactory paper title, his claim was not unfounded, and no fraud was charged against him. In the year 1872, the property having increased in value to \$2,700, the representatives of L. & N., who had died in the meantime, tendered S. \$500, or that sum and one year's interest, for the land, but did not tender a conveyance. S. refused, unless they would pay interest, or the value of the use and occupation, which was shown to be \$150 per annum. Thereupon, the heirs and representatives of L. & N. filed their bill to compel specific performance. *Held:*

1. The purchasers had as beneficial use of the land as if a conveyance had been made; and after fifteen years' undisturbed use and occupation, it was not equitable to compel S. to part with the land, which had greatly increased in value, upon payment to him of only the principal of the purchase-money, without interest or compensation for the use and occupation.

2. The fact that a small portion of the purchase-money was paid, did not alter the case, and complainants only offering the principal and one year's interest, and refusing to pay for the use of the land, and not offering to do what the court might consider ought to be done, their bill ought to be dismissed.—*Schuessler v. Hatchett et al.*, 181.

STATUTES. See **CONSTITUTIONAL LAW**.

STATUTORY SEPARATE ESTATE. See **HUSBAND AND WIFE**.

STEAMBOATS. See **COMMON CARRIERS**, 3.

SUPERSEDEAS.

1. *Mandamus ; supersedeas.*—Mandamus is not a revisory writ, and can not be legally employed to prevent the execution of an erroneous decree; this is the office generally of a writ of supersedeas.—*Ex parte Brown*, 536.

TAXES. See **REVENUE LAWS**.

TITLE.

1. *Common title ; source of ; who can not deny.*—Where plaintiff and defendant claim under a common source of title—the one by conveyance at execution sale of the property of a corporation, and the other under deeds of trust executed by it—neither can deny the source of their common title ; and the plaintiff can not assert the want of power in the corporation to acquire the property, and to convey it by mortgage ; if, however, the property had been acquired by a contract which remained executory, either party in a suit to enforce the contract, might raise the question as to the power of the corporation to acquire such property, and upon showing that the contract was *ultra vires*, could defeat recovery ; so, also, the inquiry would be material in a proceeding to vacate the charter for *misuser*, or to set aside the contract, as without the pale of corporate authority.—*Morgan & Raynor, Trustees, v. Donovan*, 241.

2. *Claim of title ; when must fail.*—A claim of title to land, through an instrument which is not recorded, will fail against one purchasing and receiving a conveyance in good faith, for a valuable consideration, without notice, actual or constructive, of such claim.—*Chandler v. Tardy*, 150.

TITLE—*Continued.*

3. P. was the original source of title to lands. In the year 1852, he conveyed by deed, attested by two witnesses, an undivided sixth interest in the north half of a certain square, to C., and afterwards, in the same instrument, conveyed his undivided sixth interest in the south half of the same square to C., for the use and benefit of his son, J. This instrument was not proved or acknowledged for record or recorded. In 1856, P. conveyed his undivided interest in the same lands, on valuable consideration, to C. in fee. This deed was duly acknowledged and recorded. C. mortgaged the lands in 1857 and 1858 to W., who purchased under decree for foreclosure, and afterwards sold in 1864 to T.; neither W. nor T. then, or before, having any knowledge or notice of the deed of 1852. After T.'s purchase, it was found among C.'s papers. In 1866, on bill for partition among tenants in common, three of the lots, in the south half of said square (to one of which J. claimed to be entitled upon division, as owner of P.'s undivided interest), were allotted to T. as the assignee of Primrose's original undivided interest therein. The claim of J., under the deed of 1852, was brought to the attention of the court, and it was decreed that the titles of the lots be vested in T., "subject to any equity J. might establish." The decree, however, did not determine J.'s equity, but left the matter open. *Held*,
 1. The deed of 1852, under which J. claimed, never having been recorded, purchasers from C. for value without notice, in good faith, and those claiming under them, were protected against J.'s claim.
 2. Although the decree, upon partition, might afterwards put purchasers from T. on notice of J.'s claim, as information thereof would appear in the claim of title; yet, as T.'s purchase was made previously, when he had no notice, actual or constructive, and as the lots partitioned stood in lieu of the interest originally purchased, T. can transmit them free from any burden or charge not attaching to the undivided interest in his hands.—*Id.*
4. *Death of payee, of written obligation to pay cotton; when legal title will not pass by indorsement.*—Where the payee of such obligation dies, the legal title thereto vests in his personal representative; but between the time of his death and the appointment of his widow as administratrix, the legal title and the right to sue is in abeyance, and she cannot then transfer such title or right to sue by indorsing the obligation to a third party.—*Auerbach et al. v. Pritchett*, 451.
5. *Deed absolute on its face; vests legal title.*—Where A. executes a deed of lands to B., conveying, on its face, the absolute title in fee simple, the legal title passes to B., and, on his death, descends to his heirs, notwithstanding a separate agreement between A. and B., wherein B. obligated himself to allow A. to redeem within two years, on the payment by him of a debt due B., for which the deed was executed.—*Smith et al. v. Murphy et al.* 630.
6. *Heir, title of; when divested.*—The title of the heir or devisee to lands devised or descended, and sold under order of the probate court for cash, is not divested until the purchase-money has been paid, the sale reported to and confirmed by the court, and a conveyance executed to the purchaser under its order.—*McCully v. Chapman*, 325.
7. *Sale of property by one having no title.*—*Leigh Bros. v. Mobile & Ohio R. R. Co.* 165. (See *Sales*, 5-8.)
8. *Trial of right of property—proof of outstanding title in a stranger; extent of rule as to.*—*Starnes v. Allen, West & Co.* 316.

TRESPASS. See CRIMINAL LAW, 74, 78.

1. *Action joint or several, against several trespassers.*—If several persons commit a trespass, the injured party may sue them jointly or severally; yet he can have but one satisfaction.—*Smith et al. v. Gayle*, 600.
2. *Same; satisfaction by one trespasser as affecting others.*—A release to one joint trespasser, or acceptance of satisfaction from one, discharges all; but an acceptance of partial satisfaction from one, and a receipt or release to that extent (having effect according to the intention of the parties, Rev. Code, § 2685,) is only available to the other defendants as partial satisfaction.—*Id.*

TRIAL OF THE RIGHT OF PROPERTY—

1. *Trial of right of property ; proof of outstanding title of stranger ; rule as to, extent of.*—While it is true that in the statutory action of the trial of the right of property, the claimant will not be permitted to defeat a recovery by the plaintiffs by proving outstanding title in a stranger, this rule extends only to cases where the plaintiff has made out a *prima facie* case, and the claimant has no privity of estate with the person whose title is set up. It does not overturn the statutory rule that the burden of proof is on the plaintiff in execution.—*Starnes v. Allen West & Co.*, 316.
2. *Same ; what proper form of issue in.*—The proper issue in this action is, an affirmation on the part of the plaintiff that the property in question is subject to his execution or attachment, and a denial of that fact by the defendant ; and unless the plaintiff proves *prima facie*, at least, a title in the defendant, he must fail though the claimant shows no title to the property in question. Lien, right, or even title in the plaintiff, gives no right to condemn the property under the execution or attachment.—*Ib.*

TROVER—

1. *When may be shown against corporation acquiring property.*—*Morgan & Raynor, Trustees, v. Donoran*, 241.
2. *Trover for conversion of stock ; what title will not support.*—Although a stockholder, whose shares have been duly transferred on the books of the company, as security for a debt, may not have such legal title as will enable him to maintain trover against the pledgee, for an unauthorized sale, he may maintain a special action on the case ; and a count in case may be added to the complaint in trover by amendment.—*Nabring v. Bank of Mobile*, 205.
3. *Trover and conversion by retaining money paid by mistake.*—*Baily v. The State*, 414.

TRUSTS AND TRUSTEES—

1. *Resulting trust ; general doctrine concerning.*—The general doctrine is, that when the purchase-money of land is advanced by one person, while the title is taken in the name of another, a trust results, in the absence of an agreement to the contrary, in favor of the person who advanced the money ; but to bring a case within the operation of this rule, the money must be paid at the time of the purchase.—*Preston & Stetson v. McMullan*, 84.
2. *Same ; as regards use of trust funds by trustee.*—When a trustee invests trust funds in the purchase of lands, and takes the title in his own name, or in that of a stranger, whether the payment is made at the time of the purchase or afterwards, the *cestui que trust* may claim the property so purchased, or any other specific property into which the trust funds can be traced ; and can also assert a lien on it for reimbursement ; and this right may be asserted not only against the trustee, but also against purchasers from him with notice, either actual or constructive.—*Ib.*
3. *Same.*—This principle applies to a purchase by the husband, with moneys of the corpus of the wife's statutory estate, of lands the title to which he took in his own name ; but the wife can not enforce her equity in such a case against a *bona fide* purchaser from her husband without notice, or against a judgment creditor (Revised Code, §§ 1590-91) who had no notice prior to the levy.—*Ib.*
4. *Action for money had and received by intestate as trustee ; when will lie ; recovery under.*—An action for money had and received by an intestate in his life time, as trustee, will lie against his administrator, if there are no unsettled matters of account growing out of the trust ; and it is no obstacle to this form of action that the amount claimed is greater than that proved to be due.—*Smith v. Fellows, Adm'r*, 467.
5. *Bona fide purchaser from trustee ; not responsible for application of funds.*—One who buys in good faith from a trustee having power to sell, and pays the purchase-money, is not responsible for its application, unless the purchaser colluded with the trustee, or knew of his intention to waste or mismanage the funds.—*Dawson et al. v. Rimsner*, 573.

TUSCALOOSA SCIENTIFIC AND ART ASSOCIATION.

1. *Tuscaloosa Scientific & Art Association, act incorporating; what does not authorize.*—There is nothing in the provisions of the act to incorporate the Tuscaloosa Scientific and Art Association, for the purpose of encouraging science and art and aiding the University of the State in replacing its library and establishing a scientific museum, approved February 3d, 1866, "which gives any warrant for setting up a lottery, or the selling of tickets authorizing the winner to demand money in the first instance.—*Tuscaloosa Scientific & Art Ass'n v. The State, ex rel. Murphy*, 54.
2. *Same; rules furnished agents by; admissibility of.*—Where the corporation issued and furnished rules to its agents for their guidance, in conducting the scheme of awards and prizes authorized by its charter, the corporation may introduce them in evidence, when a forfeiture of the charter is sought for violations of the charter by its agents; it being for the jury to determine, in view of the evidence, whether it was the bona fide purpose of the corporation to be governed by such rules, or whether the rules were mere machinery to give the conduct of its business a show of legality, violations of which by agents were acquiesced in, or connived at by the officers in charge of its affairs.—*Id.* 55.

ULTRA VIRES. See CORPORATIONS—RAILROADS—TITLE 1.

UNITED STATES. See CONFEDERATE STATES.

1. *Removal of case to U. S. Court; when properly denied.*—In the absence of any hostile legislation, regulations or custom of the State interfering with the full rights of defendant in the City Court of Selma, he can not have his cause removed to the Circuit Court of the United States because he is a negro; the act of Congress (Rev. Stats. § 641) does not authorize a removal under such circumstances.—*Thomas v. The State, ex rel. Slepney*, 366.
2. *Decisions of Supreme Court of the United States; when binding on State tribunals.*—In the decision of questions which may be carried for revision to the Supreme Court of the United States, this court recognizes the decisions of that tribunal as authoritative and binding.—*Wilson v. Brown et al.* 62.

USAGE. See CUSTOM AND USAGE.

USE AND OCCUPATION.

1. *When grantee of lands must account for use and occupation.*—If the grantee has been put in possession of the property under the conveyance, the value of the use and occupation will be charged against him, and set off against moneys paid by him for taxes and insurance, and in removing prior incumbrances.—*Potter & Son v. Gracie*, 303.

USURY.

1. *Usury; who can not set up.*—The payee of a valid promissory note, not tainted with usury, may lawfully sell and transfer it for less than the amount due by its terms; and a third person can not, in a contest with the transferee, be heard to insist that the transaction is usurious.—*Ala. Gold Life Ins. Co. et al. v. Hall*, 1.
2. *Bill seeking relief from mortgage on account of usury; misjoinder of parties complainant; when feme covert cannot claim personal relief.*—To a bill seeking relief from a mortgage on account of usury, parties complainant should not be joined unless they are entitled to common relief. And though each and all may be entitled to make the defense of usury, yet where the rights of one of the complainants is that of a feme covert claiming that the property is her statutory estate, and not subject to the mortgage made by her for the security of another's debt, such right is personal to her, and she cannot claim this personal relief under a bill filed by her conjointly with her husband and another male complainant.—*Rogers et al. v. Torbut et al.* 523.
3. *Same; practice.*—Where a complainant files a bill to obtain relief from a mortgage on account of usury, he must either bring into court the

USURY—*Continued.*

money legally due, or submit himself to the court on an offer to pay, so that the court may, without more, compel him to do equity as a condition for granting relief, whereupon the court may decree a foreclosure without the filing of a cross-bill.—*Ib.*

4. *Same; practice; admission of defendant's solicitor.*—Where, in such a case, a decree of foreclosure is authorized on the original bill, without the filing of a cross-bill, the decree will not be disturbed, because on the case made by defendant turning his answer into a cross-bill, which complainants answered, the solicitors admitted that one of the complainants was a married woman at the time the execution of the mortgage conveying her statutory estate, there being nothing in the answer authorizing the introduction of such proof, or the making of such defense.—*Ib.*

VARIANCE. See CRIMINAL LAW, 54.

VENDITIONI EXPONAS.

1. *Venditioni exponas; issuance and nature of; when proper writ; sale under.*—Although the statute declares, that a *fiert facias* issued and received by the sheriff during the life of the defendant, may be levied after his death; or if a term has not intervened, that an *alias* may issue and be levied, and does not expressly authorize the issue of a *venditioni exponas*; yet the *venditioni exponas* is in the nature of an *alias* execution as to property upon which a levy has been already made, is within the spirit of the statute, and a proper writ to complete the execution already begun; and if issued in continuation of the lien acquired in the life of the defendant, a sale under it will pass the decedent's title.—*Dryer v. Graham, adm'r*, 623.

VENDOR AND PURCHASER. See SALES.

1. *Vendor's lien on land; what debars enforcement of.*—If an administrator having sold lands under order of the probate court, accepts in part payment a debt due from himself to the purchaser, the distributees may elect to treat it as a payment, and hold the administrator liable, or disregard it entirely and hold the purchaser liable for the amount, and enforce a vendor's lien on the land also; yet, if, with full knowledge of the facts, they elect to charge the administrator with the amount in his accounts, they cannot afterwards revoke that election, and proceed in equity against the purchaser of the land.—*Nunn et al. v. Norris, adm'r, et al.* 202.
2. *Vendor's lien; what is; enforceable only in equity.*—A vendor's lien has its existence and can be enforced only in equity. It is rarely the subject of express negotiation or contract, but is an incident which courts of equity recognize and enforce as springing out of the contract of bargain and sale of lands, when attendant conditions do not repel the presumption of such incident.—*Terry v. Keaton et al.* 667.
3. *Same; conveyance and obligation to convey; presumption subject to rebuttal.*—The doctrine "that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it and not pay the full consideration money," applies to sales that are consummated by conveyance. When a mere obligation to convey is given, the title is retained as security; but when conveyance itself is executed, lien for the unpaid purchase-money is but an equitable presumption, which may be rebutted.—*Ib.*
4. *Same; what insufficient to prevent lien attaching.*—Where notes were given to secure unpaid purchase-money on land, the absence of an intention to create a lien, without more, does not prevent it from attaching.—*Ib.*
5. *Conveyance to be delivered when money paid, and mortgage to secure unpaid money; when operative; revestment in vendor; what operates as notice to intermediate purchaser.*—Where the owner executes a conveyance of lands, and deposits the same with an agent to be delivered to the purchaser when he complies with the contract, and executes a mortgage back to secure the unpaid purchase-money, such instruments become operative

VENDOR AND PURCHASER—Continued.

only from the date of delivery; the title remains in the vendor until such delivery, and, *eo instanti*, returns to him by the mortgage so as to preclude the interposition of any title or right in any other person; and the vendee's mortgage, if duly recorded within ninety days (Rev. Code, § 1857), operates as a notice of its contents to one purchasing in the interval between its delivery and record.—*McRae et al. v. Newman*, 529.

6. *What does not estop vendor from enforcing mortgage given by original vendee.* In such a case as the present, the mere fact that an attorney, while he held the deed to the original purchaser, as an *escrow*, wrote out a conveyance at the instance of such purchaser, to a third person, who paid the purchase-money, without actual notice that his immediate vendor had not paid, does not estop the vendor from enforcing the mortgage of the original vendee, if recorded in due time—such second purchaser never making inquiry of the attorney, and the attorney not being informed as to the terms of payment agreed on between the original and second purchaser.—*Id.*
7. *Lien notes payable to wife of vendor; suit by wife's administrator.*—Where husband and wife joined in a conveyance of husband's lands for the purchase of which promissory notes were given by the vendees, payable to the wife, who died intestate, before such notes were paid, her administrator may file a bill to enforce the lien created by said notes. The husband had the right to have the notes made payable to his wife, and thus vest their ownership in her, which may be enforced against the vendees, though void against his creditors at the time, if they complain.—*Terry v. Keaton et al.* 667.
8. *Sale; what necessary to avoid as fraudulent.*—To avoid a sale, when made on an adequate new consideration, on the ground that it was made with intent to hinder, delay and defraud creditors, the attacking creditors must show that the vendor made the sale with that intent, and that the purchaser participated in it, or had knowledge of some fact calculated to put him on inquiry, and thus charge him with notice.—*Florence Sewing Machine Co. v. Zeigler*, 221.
9. *Bona fide purchaser; what necessary to constitute.*—To constitute the defense of a *bona fide* purchaser without notice, the purchaser must have paid the purchase-money in full, before notice of the fraud of the vendor; and any payment made by him after notice is in his own wrong; but, as to partial payments, made before notice, he acquires an equity *pro tanto*. Whether the rule applies to sales of personal property, is not decided.—*Id.*
10. *Prayer for general relief; what relief will not be granted under.*—Where the original bill sought to set aside a sale of personal property and chooses in action, on the ground that it was fraudulent as against creditors, and also asked the appointment of a receiver to take charge of the property and collect the debts, the business acquired by the purchaser being broken up by the appointment of a receiver, and the complainant failing to establish any participation on the part of the purchaser in the fraud of the vendor, the court will not, under the general prayer for relief, require the purchaser to pay over to the complainant the unpaid portion of the purchase-money.—*Id.*
11. *Transfer of purchase-money note; when does not pass equitable lien.*—A transfer by delivery of a promissory note given to the vendor for the purchase-money of lands, if made subsequently to the conveyance of the legal title, does not pass the equitable lien of the vendor.—*Woodward v. Echols*, 665.
12. *Same; when operates to pass security for the debt; relation created between the parties.*—Where the transfer of the note was prior to the conveyance of the legal title which remained in the vendor as a security for the purchase-money, the relations of the parties was, in legal effect, that of mortgagor and mortgagee; and, whatever may have been the form of the transfer, the security which was incident to the debt passed by a transfer of the debt—the contrary not being stipulated.—*Id.*
13. *Same; vendor and vendee, no power to impair transferee's security; subse-*

VENDOR AND PURCHASER—Continued.

- quent conveyance subordinate.*—The vendee, having knowledge of the transfer of the debt before the conveyance to him was executed, it is not within the power of him and the vendor to impair such security after the transfer of the note—the subsequent conveyance is subordinate to the security, and is no obstacle to its enforcement.—*Ib.*
14. *Same; effect of taking new note from vendee in lieu of old.*—Where the transferee, subsequent to the conveyance of the legal title, takes, in lieu of the old note, a new note from the vendee, extending the time of payment, the security is not thereby impaired—especially when all intention to waive it is negated by the recital in the new note of its original consideration.—*Ib.*
 15. *Same; necessary parties to bill to enforce vendor's lien.*—Though a widow indorse a cotton obligation, made by her deceased husband, before her appointment as administratrix, the legal title thereto vests in her when so appointed, and she and her indorsee become necessary parties complainant to a bill seeking to enforce a lien on land for which such obligation was given as part payment of the purchase.—*Auerbach et al. v. Pritchett*, 451.
 16. *Power of sale under a will; what valid compliance.*—A testator provided in his will that his wife was to have the power of selling or exchanging any of the property devised, for cash or other property, provided the power be exercised by and with the advice of two persons named in the will; whereupon the wife, by ordinary deed of bargain and sale, duly attested, conveyed a lot to another, reciting in the conveyance that it was with the knowledge and consent of the two persons named in the will, and such persons endorsed on the conveyance that they ratified and confirmed the sale—*Add*, that the sale was a valid execution of the power in the will, and conveyed the title to the purchaser.—*Dawson et al. v. Ransser*, 573.
 17. *Bona fide purchaser from trustee; not responsible for application of funds.* One who buys in good faith from a trustee having power to sell, and pays the purchase-money, is not responsible for its application, unless the purchaser colluded with the trustee, or knew of his intention to waste or mismanage the funds.—*Ib.*
 18. *Misrepresentation; what will avoid sale.*—A misrepresentation by the seller, which will avoid the sale, or defeat an action for the recovery of the purchase-money, must be of a material fact, operating as an inducement to the purchase; and the purchaser having a clear right to rely on it, must be deceived thereby.—*Fre. adm'r. v. McKensie*, 115.
 19. *Caveat emptor; to what, maxim applies.*—The maxim, *caveat emptor*, applies to judicial sales; the purchaser has no ground of complaint if the title sold proves valueless, and can not defend an action at law for the purchase-money, because of misrepresentations of the administrator in making a sale of land under order of the court of probate.—*Ib.*
 20. *Sale of lands; what principle not applicable to.*—The principle declared in *Atwood v. Wright* (29 Ala. 346), as to the fraud or misrepresentation of the administrator making a sale, is confined to sales of personality.—*Ib.*
 21. *Sale by administrator, in violation of order of court.*—Where an administrator violates the order of the probate court in making a sale of decedents' lands and sells on a credit instead of for cash, the sale is in excess of his authority, and depends for its validity on the subsequent ratification of the heirs or devisees, or in a proper case, its confirmation by the Court of Chancery.—*McCully v. Chapman*, 325.
 22. *Same; parties to suit to enforce sale.*—Where an administrator files his bills to enforce a vendor's lien on lands of the decedent, sold by him, under order of the court, whether the sale be made pursuant to or in excess of the authority conferred—the sale not having been confirmed, and no conveyance having been made to the purchaser—the heirs and devisees must be made parties; and where the estate has been declared insolvent, creditors, whose claims have been filed and allowed, are also necessary parties.—*Ib.*
 23. *Assignment of purchase-money notes; what determines priority of payment.*—*Ala. Gold Life Ins. Co. v. Hall*, 1. (See *Assignment*, 8.)

VENDOR AND PURCHASER—*Continued.*

24. Contract to purchase land; rescission of; what sufficient to support. — *Cooper v. McIlwain*, 296.

VERDICT. See CRIMINAL LAW, 124-134.

WITNESSES. See CRIMINAL LAW, 135-143.

1. *Competency of witness: to what beneficiary can not testify.*—Under section 3058 of the Code of 1876, which enlarges the exception contained in section 2704 of the Revised Code, a beneficiary in the suit, though not a party to the record, can not testify in his own interest, to any transaction with or statement by a deceased person, whose estate would be affected prejudicially by the evidence.—*Drew v. Simmons*, 463.
2. *Same; what interest incapacitates.*—A person contracting with the decedent is not a competent witness, to prove the contract, in his own behalf, in a suit against the personal representative; and it would be against the policy of the statute, and might lead to great abuse to hold that his competency was restored by the transfer of a claim to another.—*Ib.*
3. *Transaction with deceased person; what does not involve.*—On an issue in such a case, as to the interest which the respective payees had in such a note, the plaintiff is a competent witness to prove the consideration of the note, who owned the property which formed that consideration, and its value; such evidence, on his part, does not involve any "transaction with, or statement by" the decedent, within the meaning of § 3058 of the Code.—*Tisdale, Ex'r v. Maxwell*, 40.
4. *Same; what constitutes.*—Any understanding between the two, by which the note was made payable to both, or by which the testator was to take certain property turned over by the makers of the note, etc., would involve a transaction with the decedent; and the plaintiff is not a competent witness, in his own behalf, to prove such facts.—*Ib.*
5. *Witnesses; what necessary to make them equally credible.*—Witnesses, to be "equally credible," must have the same measure of intelligence, honesty, means of knowledge, and absence of bias.—*Collins v. Stephens*, 554.
6. *Deposition of witness; when inadmissible.*—Where the deposition of a witness, residing outside of the State, is taken, and he afterwards comes into the court at the time of the trial, and remains at the place where it is held, his unexplained absence at the time it is proposed to introduce his evidence, although not suborned by either party, will not authorize the party taking the deposition to read it; his absence not being shown to have occurred without their procurement or consent.—*Mobile Life Ins. Co. v. Walker*, 290.

WILL. See POWERS.

WORDS AND TERMS.

1. "Abuse," in statute (Code of 1876, § 4306), punishing carnal knowledge of female under ten years; meaning of.—*Dawkins v. The State*, 376.
2. "Contract;" what is not within section 2890 of the Code of 1876.—(See *Criminal Law*, 24.)
3. "Moneyed demand," in statute (R. C. § 2678), requiring a non-suit against the plaintiff recovering less than fifty dollars, unless, &c.; meaning of.—*Mills v. Long et al.* 458.
4. "Several," means more than two.—(See *Recommendation*, 2.)
5. "Proviso," meaning of.—(See *Constitutional Law*, 2.)

See also 62

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